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IN THE

Supreme Court of the United States

October Term, 1970

No. 514

MARIE F. WINKLER,

Petitioner,

against

FREDERICK E. WINKLER,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

ZENAIDA DRABKIN,
Attorney for Petitioner,
84 William Street,
New York, N. Y. 10038.

MORTIMER H. KOENIG,
GRACE H. CONNELL,
JESSE SISKIND,
On the Brief.

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

The petitioner, Marie F. Winkler, respectfully prays that a writ of certiorari issue to review the order and decision of the Court of Appeals of the State of New York, entered in this cause on May 13, 1970. The order reversed an order of the Appellate Division of the Supreme Court of the State of New York, affirming a dismissal of plaintiff's complaint at Special Term of the Supreme Court, New York County.

Opinion Below

The Court of Appeals of the State of New York rendered no formal opinion. However, its decision (not yet reported) and order (Record on Appeal, separately filed; also set forth in Appendix A1 hereto) referred to the related case and was made on the authority of *Gleason* v. *Gleason*, 26 N. Y. 2d 28, 308 N. Y. S. 2d 347, which appears

in Appendix A4 hereto and a separate certified copy of which has been filed with the record.

The decision of the Appellate Division of the Supreme Court of the State of New York, First Department, 33 App. Div. 2d 682, 306 N. Y. S. 2d 393 together with the related opinion of that Court in *Gleason* v. *Gleason* and *Goldstein* v. *Goldstein*, reported together in 32 App. Div. 2d 402, 302 N. Y. S. 2d 857, appears in Appendix B19 and B1.

The decision of the New York Supreme Court, County of New York Special Term Part XII is not officially reported (Appendix C). The related opinion of that Court in *Shapiro* v. *Shapiro* is reported in 59 Misc. 2d 412, 298 N. Y. S. 2d 785.

Jurisdiction

The order of the Court of Appeals of the State of New York was entered on May 13, 1970. This petition for certiorari was filed within ninety days of that order. The Court's jurisdiction is invoked under 28 U. S. C. §1257(3).

Questions Presented

1. Whether a retroactive interpretation of §170 (5) of the Domestic Relations Law of the State of New York, Laws of 1966, Chapter 254, effective September 1, 1967, as amended by Chapter 700 of the Laws of 1968, which permits a separation decree, obtained in 1960 by petitioner herein as plaintiff against the respondent herein as defendant, to be converted into a divorce decree by the defendant in the separation action, without the petitioner's consent, and under a statute which permits her no defense, denies to petitioner due process of law under the Fourteenth Amendment to the Constitution of the United

States by abrogating the rights she obtained by virtue of the separation decree.

2. Whether a retroactive interpretation of Section 170 (5) of the Domestic Relations Law of the State of New York, Laws of 1966, Chapter 254, effective September 1, 1967, as amended by Chapter 700 of the Laws of 1968, which permits a separation decree, obtained in 1960 by petitioner herein as plaintiff against the respondent herein as defendant, to be converted into a divorce decree by the defendant in the separation action, without the petitioner's consent, and under a statute which permits her no defense, denies to petitioner due process of law under the Fourteenth Amendment to the Constitution of the United States by impairing her rights under her marriage to the respondent.

3. Whether such retroactive interpretation and application are a denial to petitioner of her privileges and immunities guaranteed under the Fourteenth Amendment to the Constitution of the United States in that petitioner is denied the privileges and immunities against impairment of contracts guaranteed under Article I; Subdivision 10 of the Constitution.

4. Whether a retroactive interpretion of §170 (5) of the Domestic Relations Law of the State of New York, Laws of 1966, Chapter 254, effective September 1, 1967, as amended by Chapter 700 of the Laws of 1968, which permits a separation decree, obtained in 1960 by petitioner herein as plaintiff against the respondent herein as defendant, to be converted into a divorce decree by the defendant in the separation action, without the petitioner's consent, and under a statute which permits her no defense, denies to petitioner equal protection of the laws guaranteed under the Fourteenth Amendment to the Constitution.

5. Whether the State may, by judicial interpretation that a statute is retroactive, vacate and annul a bona fide subsisting judgment of separation.

Statutory and Constitutional Provisions Involved

Domestic Relations Law of the State of New York, Section 170, Chapter 254 of the Laws of 1966, as amended by Chapter 700 of the Laws of 1968 (Appendix D).

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part: "No state shall * * * make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Article I, Section 10 of the Constitution of the United States provides in its pertinent part: "No state shall * * * pass any * * * ex post facto Law, or Law impairing the obligation of contracts, * * *."

Statement of the Case

On September 26, 1936, the parties were married at St. Patrick's Cathedral in New York City. Until on or about January 19, 1960 when respondent abandoned petitioner, they resided together as husband and wife in the City of New York. There are two children, the issue of the marriage.

Petitioner, in order to obtain support for herself and the children, instituted an action in June 1960 for separation against the respondent on the ground of his abandonment of her. After a trial of the issues, a decree of separation in her favor was entered on December 15,

1960 (Record 12-15). This decree, still in effect, awarded petitioner an allowance for her support and that of the children and provided for medical care and other benefits.

By Chapter 254 of the Laws of New York 1966, the Domestic Relations Law was amended to provide in a new Section 170 new grounds for divorce in addition to adultery, namely, cruel and inhuman treatment, abandonment for two or more years, imprisonment for three or more years, and in subdivisions (5) and (6) provisions were made for converting separation decrees and separation agreements into divorces (Appendix D). Subdivisions (5) and (6) were amended by Chapter 700 of the Laws of 1968 so that the pertinent portions thereof read as follows:

"§170. Action for divorce

"An action for divorce may be maintained by a husband or wife to procure a judgment divorcing the parties and dissolving the marriage on any of the following grounds:

* * * * * *

"(5) The husband and wife have lived apart pursuant to a decree or judgment of separation for a period of two years after the granting of such decree or judgment, and satisfactory proof has been submitted by the plaintiff that he or she has substantially performed all the terms and conditions of such decree or judgment.

"(6) The husband wife have lived separate and apart pursuant to a written agreement of separation, subscribed and acknowledged on or after April twenty-seventh, nineteen hundred sixty-six by the parties thereto in the form required to entitle a deed to be recorded, for a period of two years after the execution of such agreement and satisfactory proof has been submitted by the plaintiff that he or

she has substantially performed all the terms and conditions of such agreement. * * * "

On September 4, 1968, respondent commenced an action for divorce pursuant to Domestic Relations Law 170 (5) for the purpose of converting the 1960 separation decree obtained by petitioner against him into a divorce in his favor. Petitioner moved at Special Term to dismiss the complaint on the ground that a retroactive interpretation of the section would deprive petitioner of her constitutional rights, as will be more fully developed below. The motion was granted and the complaint dismissed. (*Winkler* v. *Winkler*, not officially reported, Appendix C.) The respondent appealed to the Appellate Division of the Supreme Court, First Department, which unanimously affirmed the order dismissing the complaint. (*Winkler* v. *Winkler*, 33 App. Div. 2d 682, 306 N. Y. S. 2d 393, Appendix B19.) Respondent then appealed to the New York Court of Appeals which reversed the order of the Appellate Division and remitted the case to Special Term for further proceedings. This is the order which it is requested that this Court review.

Finality of Order Sought to Be Reviewed

This Court has jurisdiction to review in spite of the fact that the order remitted the cause for further proceedings. *Mills* v. *Alabama*, 384 U. S. 214, 217-18; *Pope* v. *Atlantic Coast Line R. Co.*, 345 U. S. 379, 382; *Ritchfield Oil Co.* v. *State Board of Equalization*, 329 U. S. 69, 72; *Local No. 438 Construction and General Laborers' Union* v. *Curry*, 371 U. S. 542, 551. Petitioner has no affirmative defense to the action other than the constitutional issues which were consistently raised by her since the inception of this action. The Court of Appeals, emphasizing the absence of a defense in *Gleason* v. *Gleason*, 26 N. Y. 2d

28, 35 (N7), said: "Moreover the deliberate failure of the legislators to provide defenses to the new grounds further evinces and confirms their intention of abandoning the traditional fault approach to divorce * * *." This is an equity action; there is no jury; and the Trial Court must of necessity follow the opinion of the Court of Appeals, which will necessarily result in a judgment of divorce. The constitutional issues involved will remain unresolved even after the entry of judgment. Unless this Court grants this petition for certiorari and entertains jurisdiction at this time, petitioner will be required needlessly to go through a trial and again exhaust the successive appeal procedures in order to again petition this Court for a writ of certiorari. As pointed out by Mr. Justice Black in *Mills* v. *Alabama*, *supra*: "* * * Such a roundabout process would not only be an inexcusable delay of the benefits Congress intended to grant by providing for appeal to this Court, but it would also result in a completely unnecessary waste of time and energy in judicial systems already troubled by delays due to congested dockets. * * *."

Furthermore, there are countless persons similarly situated to petitioner who are adversely affected by the Court of Appeals decision and who are awaiting a determination of the constitutional issues presented. The Federal questions are "in fact ripe for adjudication when tested against the policy of Section 1257." *Pope* v. *Atlantic Coast Line R. Co.*, 345 U. S. 379, 382.

Why Certiorari Should Be Granted

(A) Petitioner Has Been Deprived of Valuable Property Rights Without Due Process

The question presented calls for an examination of whether rights obtained by a spouse by virtue of the marriage may be taken away by retroactive application of a

statute, particularly where these rights and the marital status have been previously confirmed by a judgment of separation. Not only is this a Federal question involving due process and impairment of contract rights, but it is a substantial one affecting countless persons living apart under separation decrees who may be retroactively adversely affected. Also presented is whether the statutory classification as interpreted by the Court below denies to petitioner equal protection of the laws.

In 1960, the petitioner obtained a separation decree in an action for separation which she instituted against the respondent based upon his abandonment of her. She did so in order to obtain support and maintenance for herself and their children. No other remedy was available to her. The Domestic Relations Court had no jurisdiction to grant her the necessary monetary relief to which she was entitled.[1] She could not anticipate that, because of such action on her part, she would be providing a cause of action to her husband to enable him eight years later to maintain an action for divorce against her. Her status under the separation decree was fixed at the time that she obtained it. Yet, without any act on her part, other than the obtaining of the separation decree to which she was legally entitled, and through no fault on her part, she now finds that she is a defendant in a divorce action to which the Legislature has given her no defense, as is emphasized in the opinion of Chief Judge Fuld, set forth in the discussion of the finality of the order.

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[1] Section 1164 of the Civil Practice Act then provided that a wife could not obtain support in the Supreme Court except as an incident to a matrimonial action. The Domestic Relations Court's jurisdiction for support in 1960 was limited by subdivision 3 of section 92 of the Domestic Relations Court Act to $50 a week for the wife. In her separation action petitioner was awarded $1,000 a month for herself, payments for the two children of the marriage, as well as provision for medical expense and for other benefits.

Petitioner suddenly finds that many rights, privileges and immunities, which she had, will be lost to her, wholly without any act of commission or omission on her part. Her status will change from that of a married woman to that of a divorced woman. Her separation decree will be vacated and annulled. The very idea that, by a retroactive interpretation of the statute such a result could ensue, enabling a guilty spouse to take advantage of his own wrong to the innocent spouse's detriment does violence to the due process clause of the Constitution.

The only reason petitioner is now is this predicament is that her husband, the respondent, abandoned her. By the very act of his abandonment, by his own wrong, he created for himself a cause of action for divorce against the petitioner. It is difficult to conceive how there can be a more flagrant case of the law permitting a person to profit by his own misconduct. In 1960, he could not have obtained a divorce because of abandoning petitioner, nor can he under the revised statute obtain a divorce by reason of such abandonment. It would appear then that the sole ground entitling respondent to maintain this action is the fact that petitioner availed herself of her legal right to obtain the separation decree based upon his abandonment of her. If the statute were given prospective application only, such a result could only ensue if a plaintiff knowingly elected to maintain a separation action, fully aware of its possible conversion consequence.[2] She thus would have freedom of choice. In 1960 there was no choice offered to her, yet she is now bound by her action taken at a time when she could have had no knowledge of the consequences of her act.

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[2] She would no longer have to start a matrimonial action to obtain support since the Family Court's jurisdiction as to amount is no longer limited (Family Court Act, Sec. 412, effective Sept. 1, 1962).

Nichols v. *Coolidge*, 274 U. S. 531, 47 S. C. 710, 71 L. Ed. 1184, held that §402 (c) of the Revenue Act approved February 24, 1919 ("Estate Tax") insofar as it required the inclusion in the gross estate of the value of property transferred by a decedent prior to its passage merely because the conveyance was intended to take effect in possession or enjoyment at or after his death was arbitrary, capricious and invalid. The *Nichols* case was decided on the ground that the taxpayer could not reasonably have anticipated the nature or the amount of the tax at the time of his voluntary act. In the same manner petitioner herein could not have foreseen the consequences of her voluntary act in obtaining a decree of separation.

In *Welch* v. *Henry*, 305 U. S. 134, 147, 59 S. C. 121, 83 L. Ed. 87, the Court went out of its way to point up the rationale underlying *Nichols* v. *Coolidge*, 274 U. S. 531, when it said at page 147:

> "In the cases in which this Court has held invalid the taxation of gifts made and completely vested before the enactment of the taxing statute, decision was rested on the ground that the nature or amount of the tax could not reasonably have been anticipated by the taxpayer at the time of the particular voluntary act which the statute later made the taxable event. Nichols v. Coolidge, 274 U. S. 531, 542; Untermeyer v. Anderson, 276 U. S. 440, 445 (citing Blodgett v. Holden, 275 U. S. 142, 147); Coolidge v. Long, 282 U. S. 582. Since, in each of these cases, the donor might freely have chosen to give or not to give, the taxation, after the choice was made, of a gift which he might well have refrained from making had he anticipated the tax, was thought to be so arbitrary and oppressive as to be a denial of due process."

Emphasizing the patent inequity, Justice Eager of the Appellate Division, writing for the Court in *Gleason* v. *Gleason*, 32 App. Div. 2d 402, 407 (Appendix B8), and quoting from *Abelson* v. *Abelson*, 59 Misc. 2d 172, 180-181, said: "* * * there is an inherent injustice aside from constitutional considerations in grafting on existing separation judgments the unforeseen legal consequences which a retroactive application of subdivision (5) of Section 170 would necessarily entail."

Beyond the offense to our sense of justice occasioned by the Court of Appeals' interpretation of the statute is the fact that retroactivity in this case deprives petitioner of her rights to due process and the equal protection of the laws under the Fourteenth Amendment to the Constitution and impairs her contractual and legal rights in violation of Article I, subd. 10 of the Constitution of the United States. These rights stem: a) from petitioner's marriage to respondent[3] and b) from the separation decree obtained by her against the respondent.

An enumeration of some of these rights and the consequences of a divorce upon them follows: (1) Title to real estate owned by a spouse as tenant by the entirety is not affected by a separation decree (Domestic Relations Law Sec. 234). A divorce, however, converts this tenancy into a tenancy in common. The spouse thus loses the right of survivorship. *In re Kutick*, 1962, 33 Misc. 2d 580, 226 N. Y. S. 2d 869. In *Collins* v. *Commissioner*, 412 F. 2d 211 (10th Cir. 1969), on remand from the Supreme Court (393 U. S. 215), the Circuit Court held that the wife had a vested interest in

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[3] Marriage under the law of New York is a civil contract. Domestic Relations Law, Section 10, reads as follows:

"¶ 10. MARRIAGE A CIVIL CONTRACT

Marriage, so far as its validity in law is concerned, continues to be a civil contract, to which the consent of parties capable in law of making a contract is essential. L. 1909, c. 19."

jointly held property so that a division ordered by the Oklahoma Court in a divorce proceeding was a non-taxable division under Federal law. (2) Rights of the innocent surviving spouse to elect to take against the will of the other. This is cut off by divorce. (New York Estates, Powers and Trusts Law, Sec. 5-1.2.) (3) The right to take a share of the spouse's intestate estate is cut off by divorce. (New York Estates, Powers and Trusts Law, Sec. 4-1.1.) (4) The right to letters of administration in the estate of the deceased spouse is cut off by divorce. (Surrogate's Court Procedure Act Sec. 1001.) (5) The right to exemption of property for the benefit of the family is lost to the divorced spouse. (New York Estates, Powers and Trusts Law, Sec. 5-3.1.) (6) The divorced wife would lose social security benefits unless the marriage had existed for twenty years or more. (7) Hospital and medical insurance benefits to a wife, including Blue Cross and Blue Shield coverage, would be lost to the divorced wife under their express provisions. (8) The divorced spouse would lose benefits under union retirement funds, group insurance pension plans and other retirement benefit plans now in vogue. (9) The wife might lose certain rights under the immigration and naturalization laws of the United States as a result of a divorce. (10) Burial rights in the husband's family plot may be lost to the divorced spouse.

Even though some of the aforesaid rights are sometimes called inchoate, they are nonetheless valuable rights. Petitioner does not dispute the fact that a State may legislate with respect to marriage, the incidents of marriage, the subject of divorce, and intestate distribution of property. The question is: Has the State any right or power to affect these previously fixed relationships by making its laws apply retrospectively to deprive a person of his rights, property or status? While a so-called inchoate right is capable of being defeated by the prior

death of the wife, if she does survive she should be in a position to enjoy these rights and not to have them stripped from her in advance through no fault or willful act on her part. Certainly, to have a right which may be defeated by the possible prior death of another has far greater meaning and value than if that right were wholly non-existent. In one case, the spouse may possibly, and if the spouse is a woman and younger than her husband, may very likely see the day when she will get the full benefit of these rights. In the other case, the spouse having been divested of the rights, cannot even have the possibility of ever enjoying them. Certainly, viewed in this light, these rights are valuable property.

Is it not time to re-examine the heretofore casual dismissal of some of the wife's rights as being merely inchoate and to determine whether marriage is not indeed such a contract as will fix rights no matter what they may be labeled? In *The Trustees of Dartmouth College* v. *Woodward*, 4 Wheaton 518, 629, Mr. Chief Justice Marshall, delivering the opinion for the Court, said: "When any state legislature shall pass an act annulling all marriage contracts, or allowing either party to annul it, without the consent of the other; it will be time enough to inquire, whether such an act be constitutional." It is petitioner's contention that the interpretation placed upon the New York statute by the Court of Appeals permits such an annulment of her marriage without her consent, without just cause and without fault, to the detriment of petitioner's previously acquired rights.

It is not only the deprivation of a so-called vested right which will call into play the protection of the due process clause of the Constitution. That clause, in its more refined aspect, is also a protection against the perpetration of an inequity which is shocking to the conscience and which violates the fundamental principles of right and justice.

Mr. Chief Justice Taft so stated in writing the opinion in *Truax* v. *Corrigan*, 257 U. S. 312, at page 329:

> "It is true that no one has a vested right in any particular rule of the common law, but it is also true that the legislative power of a State can only be exerted in subordination of the fundamental principles of right and justice which the guaranty of due process in the Fourteenth Amendment is intended to preserve, and that a purely arbitrary or capricious exercise of that power whereby a wrongful and highly injurious invasion of property rights as here is practically sanctioned and the owner stripped of all real remedy, is wholly at variance with those principles."

Inchoate rights prior to the death of the husband have been protected by the law. The right of dower has always been called inchoate, and it is so referred to in the New York statute (Real Property Law, Section 190). Even though it accrued to the widow and not the wife, it has always been zealously protected under the New York law. A husband could not pass good title to lands unless the wife released her dower. In *Clifford* v. *Kampfe*, 147 N. Y. 383, 385, 42 N. E. 1, it was referred to as "not only a legal right * * * but a moral right". In *Byrnes* v. *Owen*, 243 N. Y. 211, 216, 153 N. E. 51, it was stated that the right of dower was "possibly the most highly and widely cherished property right resulting from marriage * * *", and one which the Courts were alert to protect from fraudulent destruction and that such protective attitude extended to an inchoate right of dower equally with a perfected one. The right could not be taken from the wife even after she divorced her husband but only when he divorced her because of her adultery. *Boggiano* v. *Boggiano*, 38 N. Y. S. 2d 462, affirmed 265 App. Div. 856, 38 N. Y. S. 2d 355. If the husband's property were taken

by eminent domain, she retained her interest in the consideration paid for the taking. *In re Cropsey Ave. in City of New York*, 268 N. Y. 183, 197 N. E. 189. When right of dower was abolished in New York in 1930, it was done prospectively only. (Section 190, Real Property Law, Laws of 1909, Ch. 52, amended by Laws of 1929, Ch. 229.) At the same time and by the same chapter of the laws of 1929, a portion of the intestate share of the decedent's real as well as personal property was allocated to the surviving spouse. This distribution to her, under the provisions of Section 82 of the Decedent Estate Law was as to any real property "in lieu of any and all rights of dower", and these provisions are still in effect in New York, as now contained in the New York Estates, Powers and Tusts Law, Section 4-1.1 (g).

If the inchoate right of dower was so zealously protected in New York as to give it the status of such a substantial right as indicated above, it is petitioner's contention that the distributive share to which she would be entitled in her husband's intestate estate and the right to elect to take against his will which also was given to a widow at the same time that dower was abolished should be as equally well protected as the right of dower which it superseded. If any incidents of vested property rights attached to dower even though it was called inchoate, the same incidents should attach to the wife's interests in the estate of her husband. Certainly, the State should not be permitted summarily and arbitrarily to retroactively and completely deprive petitioner of any vestige of right in respondent's estate.

(B) The State May Not Annul a Subsisting Judgment After the Time to Appeal Has Expired

In *Lynch* v. *U. S.*, 292 U. S. 571, 580, this Court said: "Contracts between individuals and corporations are impaired within the meaning of the Constitution whenever

the right to enforce them by legal process is taken away or lessened." Petitioner asserts that the rights under her separation decree will be impaired by reason of the fact that, if a judgment of divorce is entered against her, it will supersede her separation decree. A separation decree is an adjudication that the marriage subsists, while a divorce decree is an adjudication that the marriage has been dissolved. The State, by a judicial retroactive interpretation of a statute, cannot legally thus vacate a bona fide, valid judgment after time to appeal has expired. The law is well settled that a judgment once obtained has binding force and sanctity. Certainly, under the New York cases, which it is respectfully submitted should be controlling as to whether a judgment is a contract or not, there have been numerous holdings to the effect that once the time to appeal from a judgment has expired, it becomes an unchangeable right and a property right which can only be disposed of by the owner or by way of eminent domain. *Livingston* v. *Livingston*, 173 N. Y. 377, 66 N. E. 123, affirming 74 App. Div. 261; *Matter of Greene*, 166 N. Y. 585, affirming 55 App. Div. 475, 67 N. Y. S. 291; *Germania Savings Bank* v. *Village of Suspension Bridge*, 159 N. Y. 362, 73 Hun 590.

The judgments in those cases just cited had become absolute rights which could not be impaired by statute. In *Livingston* v. *Livingston* (*supra*), it was held that a subsequent statute could not affect a decree for alimony previously entered which had become final even though the contention was made that alimony being incidental to a divorce could be varied in the discretionary powers of the Court. It was held to be a vested right conferred by a final judgment, and the fact that it was called remedial made it none the less obnoxious to the constitutional prohibition against impairment of a contract since it violated a substantial right.

The question as to whether a judgment is constitutionally protected is a Federal question which was passed upon affirmatively by this Court in *W. B. Worthen Co.* v. *Thomas*, 292 U. S. 426, 54 S. C. 816, 78 L. Ed. 1344 (discussed below) and in *McCullough* v. *Virginia*, 172 U. S. 102, 19 S. C. 134, 43 L. Ed. 382. In the latter case, this Court sustained the constitutional sanction against the impairment of rights acquired under a judgment. This Court held that when actions have passed into judgment, the power of the legislature to disturb the rights thereby created ceased; that the rights acquired were not disturbed by a subsequent repeal of the statute; and that inasmuch as the judgment was rendered prior to repeal, the rights acquired by the judgment could not constitutionally be taken away. Whether or not a judgment is a contract in the ordinary sense of an agreement made between persons, nevertheless a judgment creates an obligation of the highest nature, and it creates and vests substantial rights. The statute under consideration having been given retroactive effect by the New York Court of Appeals improperly abrogates the obligations created by the judgment of separation. In *State of Louisiana* v. *Mayor of New Orleans*, 109 U. S. 285, Mr. Justice Bradley in his concurring opinion said of a judgment that "it is founded upon an absolute right and is as much an article of property as anything else that a party owns, and the legislature can no more violate it, without due process of law, than it can other property."

To justify retroactive application of Section 170 of the Domestic Relations Law, some New York Courts have interpreted the statute to be remedial in nature. It is petitioner's contention that so sweeping a change as was effected by said statute, completely revising and greatly expanding the grounds for divorce, is far more than merely remdial. It in fact constitutes a substantial change in the

substantive law. Even though it were to be considered as remedial, this Court held in *W. B. Worthen Co.* v. *Thomas*, 292 U. S. 426, that where a statute created a change in remedies which destroyed substantial rights, the legislation as applied retroactively was a clear violation of the constitutional restriction. In that case, appellant had obtained a judgment upon a contract and garnished a life insurance company which owed the defendant money upon a policy on the life of her deceased husband. After this judgment was obtained and become final, the legislature passed a law exempting the proceeds of life insurance from execution and attachment under a judgment. The appellant's contention that said law was remedial and that therefore it did not impair the obligations of a contract was overruled by this Court which upheld the inviolability of the judgment against subsequent legislative interference.

Even when the public welfare is invoked as an excuse, there are bounds to what a legislature may do under the guise of remedial legislation. *Worthen Co.* v. *Kavanaugh*, 295 U. S. 56, 55 S. C. 555, 79 L. Ed. 1298, relying on the holding in *W. B. Worthen Co.* v. *Thomas, supra*, held that the dividing line between substance and remedy is at times obscure and that though a State is free to regulate the procedure in its courts, what is controlling is the underlying reality rather than the form or label. Remedial changes have certain limitations as Mr. Justice Cardoza stated in *Worthen Co.* v. *Kavanaugh*, 295 U. S. 56, 60: "Even when the public welfare is invoked as an excuse, these bounds must be respected." (See also *Barnitz* v. *Beverly*, 163 U. S. 118, 16 S. C. 1042, 41 L. Ed. 90.)

In the instant case, assuming that the legislation is remedial, a retroactive interpretation of it cannot be justified on that ground since the petitioner will not only be

stripped of all her rights under the judgment which she had obtained, but the judgment itself will be completely annulled and set aside. That the Court below erred in its interpretation of the statute so as to give it retroactivity is not a question which this Court will pass upon; however, petitioner believes it is important to point out that a prospective construction of the statute would not have raised the constitutional questions now presented. The Court below failed to follow the rule that a construction which raises grave and doubtful constitutional questions should not be adopted where some other construction is open. See *Mo. Pac R. R. Co.* v. *Boone*, 270 U. S. 466, 472, 46 S. C. 341, 70 L. Ed. 688.

(C) Retroactive Interpretation of the Statute Is Repugnant to the Equal Protection Clause of the Constitution

The Court below interpreted subdivision (5) of Section 170 of the Domestic Relations Law to have retroactive effect, permitting the conversion of a separation decree into a judgment of divorce retroactively, so as to make it apply to separation decrees obtained at any time prior to the effective date of the statute, whereas subdivision (6) by its terms restricted the conversion to a divorce, in the case of parties living apart under agreements, to those agreements which were entered into subsequent to April 27, 1966. The tenor of the opinion of the Court of Appeals in *Gleason* (32 N. Y. 2d 28), written by Chief Judge Fuld, is that it was the intent of the legislature to legally declare dead those marriages which were in fact dead. He states that there are valid differences between separation decrees and separation agreements to justify the different classifications so as to permit retrospective application in the case of a separation decree and prospective effect only with respect to separation agreements (Opinion, p. 41, A15). It is respectfully submitted that Chief Judge Fuld points out distinctions which are not in fact differences and which bear no reasonable relationship to the

object of the statute, which he says is legally to end dead marriages. The essence of Section 170 in subdivisions (5) and (6) is a living apart for two years. For the purpose of the statute, as declared by Chief Judge Fuld, there are in fact no real differences between a separation decree and a separation agreement. The fact that one "is imposed by judicial fiat" (which requires the intervention of the State) and that the other is "the product of a voluntary undertaking" is a difference in form only; in fact, the decree, because it is imposed by law, should have a more enduring and binding effect. While the decree may be subject to modification, the modification may be only with respect to the conditions imposed by the decree, not with respect to the adjudication that there is a valid and subsisting marriage, which is implicit in the decree. A separation agreement, on the other hand, has a much more tenuous existence since it may be changed at the will of both contracting parties. The fact that a remedy for breach of the decree may be by way of proceedings to punish for contempt and the remedy for breach of the agreement by civil suit only has no relationship to the object which the statute seeks to accomplish; as a matter of fact, this is merely one more indication of the greater sanctity which a decree should be afforded. While the differences pointed out by the Court do exist, what do such technical differences bear upon whether a marriage is really dead or whether it is capable of being revived? The different classifications created by the retroactive interpretation of the statute are purely arbitrary and capricious. It is difficult to understand why the legislature should have intended to retroactively apply the dead marriage theory only to separation decrees while specifically applying that theory prospectively only to separation agreements. Certainly, the legislature must have known that there were at least as many, if indeed not far more separation agreements outstanding at the time

of the passage of the law than separation decrees. The interpretation placed upon the statute and upon the legislative intent has thus created a class distinction which is insupportable by any constitutional test.

This Court has declared unconstitutional statutes violating the equal protection clause of the Constitution in *Truax* v. *Corrigan*, 257 U. S. 312; *Griffin* v. *Illinois*, 351 U. S. 12; *Baxstrom* v. *Herold*, 383 U. S. 107; *Rinaldi* v. *Yeager*, 384 U. S. 305; *Reitman* v. *Mulkey*, 387 U. S. 369; *Loving* v. *Virginia*, 388 U. S. 1; *King* v. *Smith*, 392 U. S. 309.

§170 subdivision (5) of the Domestic Relations Law having been construed as retroactive in effect, we are presented with the only possible situation under the law where a judgment of divorce can be obtained against a non-consenting innocent spouse: Under the statute in force at the time of the commencement of this action, there can be no conversion action unless the spouses either voluntarily enter into a separation agreement, both husband and wife knowing in advance that either could institute an action for divorce in two years, or unless there were a separation decree from which the same conversion privileges would flow. However, a wife fully aware of the consequences involved, under the new statute, could avoid them by seeking support and maintenance in the Family Court, instead of instituting a separation action, as this petitioner was compelled to do in 1960. Thus, she would either have to consent; or at least have the freedom of choosing not to consent. Under a retroactive application of the statute, however, the innocent spouse is faced with a judgment of divorce against her, having neither consented thereto nor having been given any freedom of choosing not to have brought her action, knowing that it might lead to divorce. Any such classification would be arbitrary and bear no relationship to the object which the statute was enacted to accomplish.

Following the Court of Appeals decision in Gleason, the statute was amended twice, both amendatory laws being signed by the Governor on May 18, 1970. One law, effective immediately, eliminated the April 27, 1966 cutoff date in subdivision (6) of §170 (Ch. 867 of the Laws of 1970), apparently evincing legislative intent to eliminate the class distinction. The other law, effective in 1972, reduced the living apart period to one year under both subdivisions (5) and (6), and retained the cutoff date of April 27, 1966 for separation agreements in subdivision (6) (Ch. 835 of the Laws of 1970). Thus the statute, unless it is again amended, will continue to arbitrarily differentiate between decrees and agreements. In any event, the petitioner contends that the law as it was in September, 1968, when this action was instituted against her, controls; and that she was not afforded equal protection of the laws.[4]

Furthermore, there is another fatal element of discrimination effected by the retroactive interpretation of the statute. In 1960 petitioner chose to pursue her legal remedy based upon the respondent's abandonment of her;

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[4] The following rules of construction are quoted from McKinney's Consolidated Laws of New York Book 1 Statutes. The pertinent portions of § 52 read:

> "* * * Thus it is the general rule that an amendment will have prospective application only, unless its language clearly indicates that it shall receive a contrary interpretation. Hence a provision in an amendatory statute that 'this act shall take effect immediately' has been held to exclude the idea that it should be retroactive. * * * Those parts of the statute which are unchanged by the amendment retain their original force as though no amendment had been made, while the new provisions apply only from the date of the enactment. * * *"
>
> See *Walker* v. *Walker*, 155 N. Y. 77, 49 N. E. 663, reversing 47 N. Y. S. 513, 21 App. Div. 219; *Jacobus* v. *Colgate*, 217 N. Y. 235, 111 N. E. 837, reversing 151 N. Y. S. 1122, 166 App. Div. 931, granting appeal 150 N. Y. S. 1056, 165 App. Div. 227.

as a result she now is subject to the retroactive application of the 1966 law. Those persons, who were abandoned prior to the effective date of this statute and who did not, for one reason or another, pursue the right to obtain a separation decree on that ground and who are still living apart, are not now affected by subdivision (5) of §170 of the Domestic Relations Law. They are wholly free of its effect. The classification thus created is an invidious one, particularly since the only ground for the classification is brought about as the result of a spouse pursuing the remedy she was entitled to pursue because of a wrong to her. Certainly, there are innumerable marriages, where the parties separated prior to the effective date of the statute without legal sanctions of one sort or another, which are equally as dead as those marriages where the living apart is under a decree or agreement. In *Truax* v. *Corrigan*, 257 U. S. 312, the Court struck down a statute which denied to an employer the right to the use of an injunction against picketing and left the employer only with a remedy under the criminal law in the event there was violence. In connection with the claim of unequal protection of the laws, this Court held that such a denial of the right to injunction to an employer, while permitting the use of injunction procedure to others to restrain the same acts committed elsewhere than in a labor dispute was a denial of due process. The creation of a right to convert into a divorce either a separation judgment or a separation agreement when the parties are living separate and apart, while withholding that right from married couples voluntarily living apart, or living apart where there is no decree or agreement is similar to the situation in *Truax* v. *Corrigan*, and constitutes a denial of due process.

CONCLUSION

For the reasons set forth herein, this petition for a writ of certiorari should be granted to review the order of the Court of Appeals of the State of New York.

Respectfully submitted,

ZENAIDA DRABKIN,
Attorney for Petitioner,
84 William Street,
New York, N. Y. 10038.

MORTIMER H. KOENIG,
JESSE SISKIND,
GRACE H. CONNELL,
On the Brief.

APPENDIX A

COURT OF APPEALS

State of New York, ss:

Pleas in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 13th day of May in the year of our Lord one thousand nine hundred and seventy, before the Judges of said Court.

Witness,

The Hon. Stanley H. Fuld,
Chief Judge, Presiding

Raymond J. Cannon, Clerk.

Remittitur May 13, 1970

1. No. 110. 70

Frederick E. Winkler,

Appellant,

vs.

Marie F. Winkler,

Respondent.

Be it Remembered, That on the 2nd day of March in the year of our Lord one thousand nine hundred and seventy, Frederick E. Winkler, the appellant in this cause, came here unto the Court of Appeals, by Bisco, Winkler

& Higgiston, his attorneys, and filed in the said Court a return thereto from the order of the Appellate Division of the Supreme Court in and for the First Judicial Department. And Marie F. Winkler, the respondent in said cause, afterwards appeared in said Court of Appeals by Koenig, Siskind & Drabkin, her attorneys.

Which said return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals, this cause having been submitted, after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court herein be and the same hereby is reversed, without costs, and the case remitted to Special Term for further proceedings on the authority of *Gleason* v. *Gleason* (26 N Y 2d 28).

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the Supreme Court of the State of New York, there to be proceeded upon according to law.

THEREFORE, it is considered that the said order be reversed, without costs, &c., as aforesaid.

And hereupon, as well the return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the same Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains

in the said Supreme Court, before the Justices thereof, &c.

RAYMOND J. CANNON
Clerk of the Court of Appeals
of the State of New York.

Court of Appeals, Clerk's Office,
Albany, May 13, 1970.

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

(Seal)

RAYMOND J. CANNON
Clerk.

Appendix A

JACKIE GLEASON, Appellant, *v.* GENEVIEVE GLEASON, Respondent.

ELI GOLDSTEIN, Appellant, *v.* BEATRICE GOLDSTEIN, Respondent.

Chief Judge FULD. In 1966, the Legislature repealed this State's ancient divorce laws—which for almost 200 years had sanctioned divorce solely for adultery—and enacted the Divorce Reform Law (L. 1966, ch. 254, eff. Sept. 1, 1967) authorizing divorce on other grounds (Domestic Relations Law, § 170). In addition to four grounds based on "fault," new section 170 of the Domestic Relations Law specified two "nonfault" grounds predicated on a couple's living apart for a period of two years after the granting of a separation judgment or decree (subd. [5]) or the execution of a written separation agreement (subd. [6]).[1] In the two cases before us, we

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1. Subdivision (5) of section 170, insofar as pertinent, reads as follows:

> "An action for divorce may be maintained by a husband or wife to procure a judgment divorcing the parties and dissolving the marriage on any of the following grounds:
>
> * * *
>
> "(5) The husband and wife have lived apart pursuant to a decree or judgment of separation for a period of two years after the granting of such decree or judgment, and satisfactory proof has been submitted by the plaintiff that he or she has substantially performed all the terms and conditions of such decree or judgment."

The succeeding subdivision, which deals with "living apart" pursuant to a separation agreement, recites:

> "(6) The husband and wife have lived separate and apart pursuant to a written agreement of separation, subscribed and acknowledged on or after April twenty-seventh, nineteen hundred sixty-six by the parties thereto in the form required to entitle a deed to be recorded, for a period of two years after the execution of such agreement and satisfactory proof has been submitted by the plaintiff that he or she has substantially performed all the terms and conditions of such agreement."

are called upon to decide whether subdivision (5) is available where the decree was rendered prior to the enactment of the new statute and in favor of the spouse opposing the divorce.

In the *Gleason* case, the plaintiff brought his action in October of 1968; he alleges that he and his wife have been living apart for more than two years, pursuant to a separation decree obtained by Mrs. Gleason in June of 1954, and that he has complied with all of its terms. The defendant moved to dismiss the complaint for failure to state a cause of action (CPLR 3211, 3212), contending that section 170 has only prospective operation and that, if applied "retroactively", it would be unconstitutional. Supreme Court Justice KORN, sitting at Special Term in New York County, denied the motion; he decided that subdivision (5) was retroactive and rejected the defendant's argument that such an application of the statute was unconstitutional (59 Misc 2d 96).[2]

The *Goldstein* case involves the same fact pattern as *Gleason* v. *Gleason*—a pre-1966 separation decree in favor of the wife and the institution of suit by the husband based on their living apart for more than two years. Here, too, the defendant moved to dismiss the complaint. In this instance, however, the motion was granted; Supreme Court Justice FRANK, before whom the matter came, decided that subdivision (5) was not to be applied retroactively.

The appeals in both the *Gleason* and *Goldstein* cases were decided by the Appellate Division for the First Department at the same time and in one opinion (32 A D

2. We note, however, that no final disposition was made in plaintiff husband's favor because of a factual dispute as to his compliance with the terms of the separation decree.

2d 402). That court, by a 3 to 2 vote, reversed Special Term's order and dismissed the complaint in *Gleason* and affirmed in *Goldstein*. Holding that subdivision (5) did not apply to pre-existing judgments of separation, the majority wrote that "retroactive application would confer authority upon the courts to dissolve a marriage without the consent of a nonguilty party" and that it is "questionable whether the State may constitutionally do this" (32 A D 2d, at pp. 407-408). The dissenting justices, on the other hand, concluded that the Legislature intended subdivision (5) to apply to previously granted decree (pp. 410-414) and, in the course of their opinion, noted that the Second Department had unanimously reached the same conclusion. (See *Schacht* v. *Schacht*, 32 A D 2d 201; see, also, *Kaplan* v. *Kaplan*, 31 A D 2d 247, 250.)

We agree with the dissenters in the First Department and the unanimous Appellate Division for the Second Department that the Legislature intended that subdivision (5) of section 170 of the Domestic Relations Law should be applied "retroactively", in the sense of encompassing pre-1966 decrees, and that, as so applied, it offends against neither due process, the equal protection of the law nor any other constitutional provision.

Before considering the question of retroactivity and the problems of constitutionality thus posed, we deem it important to emphasize that nothing turns upon the fact that, in each of these particular cases, the divorce is being sought by the so-called "guilty" spouse, that is, the party who was unsuccessful in the prior separation suit.

The concept of divorce on the ground—specified in subdivision (5)—that husband and wife have lived apart for two years or more pursuant to a decree of separation is self-evident. Equally clear is the public policy which

underlies that concept. If a reconciliation has not been effected within two years following a judicial separation, the Legislature has concluded, and reasonably so, that the parties are irreconcilable and the marriage dead. Since, as is apparent, the legislative design was to render this a basis for divorce, it follows that it makes no difference whether it is the "innocent" or "guilty" party who seeks to convert the judicial separation into a final divorce. Moreover, the deliberate failure of the legislators to provide defenses to the new grounds further evinces and confirms their intention of abandoning the traditional fault approach to divorce and permitting the termination of marriages even where both parties are at fault—except in cases of adultery (Domestic Relations Law, § 171). In a word, if there is no longer a viable marriage, the question of fault, of "guilt" or "innocence", is irrelevant.[3]

The vital and operative fact is that the parties have actually lived apart for two years after September 1, 1966,[4] pursuant to a separation decree. The only condition imposed is that the plaintiff furnish "satisfactory proof" that all the terms and conditions of that decree have been substantially performed. The real purpose of this nonfault provision was, as noted, to sanction divorce on grounds unrelated to misconduct. The decree is simply intended as evidence of the authenticity and reality of the separation. Implicit in the statutory scheme is the legislative recognition that it is socially and morally un-

3. Indeed, an unsuccessful attempt was made during the 1969 legislative session to amend the statute to make the conversion ground provided by subdivision (5) available only to the "innocent" party. (Assem. Intro. No. 1252; see Association of Bar of City of N. Y., Committee on State Legislation, Bulletin No. 5, March 10, 1969, pp. 231-233.)

4. The statute requires that the two years of "living apart" date from September 1, 1966 (L. 1966, ch. 254, § 15).

desirable to compel couples to a dead marriage to retain an illusory and deceptive status and that the best interests not only of the parties but of society itself will be furthered by enabling them "to extricate themselves from a perpetual state of marital limbo." (*Adelman* v. *Adelman*, 58 Misc 2d 803, 805; see, also, Wadlington, Divorce Without Fault Without Perjury, 52 Va. L. Rev. 32, 81-87.)

As indicated, it is our view that subdivision (5) of section 170 is to be construed to apply to decrees rendered before 1966. In reaching this conclusion, we have not failed to consider the principle that the law generally favors the prospective interpretation of a statute. It "takes a clear expression of the legislative purpose", this court has written, "to justify a retroactive application" (*Jacobus* v. *Colgate*, 217 N. Y. 235, 240) but that purpose is here unequivocally established not only by the literal language of the statute—as the Appellate Division itself observed (32 A D 2d, at p. 404)—not only by its context but by its legislative history as well. (See, e.g., *Garzo* v. *Maid of the Mist*, 303 N. Y. 516, 522; *Matter of Mullane* v. *McKenzie*, 269 N. Y. 369, 373.)[5]

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5. It is worthy of note that the overwhelming weight of authority supports retroactive application of legislative creation or amendment of divorce grounds, unless the statutory language employed precludes such a construction. (See, e.g., *Parks* v. *Parks*, 116 F. 2d 556; *Tipping* v. *Tipping*, 82 F. 2d 828; *Fuqua* v. *Fuqua*, 268 Ala. 127; *Schuster* v. *Schuster*, 42 Ariz. 190; *White* v. *White*, 196 Ark. 29; *Stallings* v. *Stallings*, 177 La. 488; *Campbell* v. *Campbell*, 174 Md. 229; *Gerdts* v. *Gerdts*, 196 Minn. 599; *State ex rel. Progress* v. *Court*, 53 Nev. 386; *Cooke* v. *Cooke*, 164 N. C. 272; *McGinley* v. *McGinley*, 295 S. W. 2d 913 [Tex.]; *Hagen* v. *Hagen*, 205 Va. 791; see, also, Note, Retroactive Application of New Grounds for Divorce under § 170 Domestic Relations Law, 17 Buff. L. Rev. 902, 907-908; Ann., Divorce Statute—Retrospective Effect, 23 ALR 3d 626, 630-632; but see, contra, *Jarvis* v. *Jarvis*, 3 Edw. Ch. 462 [1841]; *Sherburne* v. *Sherburne*, 6 Me. 210 [1829]; *Scott* v. *Scott*, 6 Ohio 534 [1834]; *Pierce* v. *Pierce*, 107 Wash. 125 [1919].)

Appendix A

When the Divorce Reform Law was originally enacted in April of 1966, its concluding section (L. 1966, ch. 254, §15), after reciting that it was to become effective on September 1, 1967, went on to declare explicitly that the two-year period of living apart specified in subdivisions (5) and (6) "shall not be computed to include any period prior to September first, nineteen hundred sixty-six", *a year before the statute's effective date.* Here was unmistakable demonstration that those subdivisions were not to be given wholly prospective application. If the Legislature had intended that the decree must be one granted subsequent to the effective date of the statute—September 1, 1967—it could not logically have prescribed that the period of living apart might begin one year prior to that effective date.[6]

Obviously, if the parties may compute the period of living apart commencing a year before the operative date of section 170, then, the statute must contemplate that it could be prudent to a decree rendered even earlier. Reasonably and sensibly read, the statute, as a whole, points the construction that all that has to be proved is that there is some kind of formal document of separation—in this case, a judicial decree—that the plaintiff has complied with its terms and that the parties have lived apart pur-

6. Furthermore, although another section of the Divorce Reform Law (L. 1966, ch. 254, § 7)—comprising section 210 of the Domestice Relations Law—provided that "[n]o action for divorce * * * may be maintained on a ground which arose more than five years before the date of the commencement of that action for divorce", it expressly exempted subdivision (5) from this five-year period of limitation. Had the Legislature, when it decided not to place a "time limitation" on a subdivision (5) suit, wished to bar reliance on a pre-1966 decree, it would unquestionably have so provided in this section.

suant to the decree for two years after September 1, 1966.[7] The function of the decree, as we have already noted, is merely to authenticate the fact of separation. Consequently, the living apart ground became operable after September 1, 1968, and entitled a plaintiff to a divorce regardless of the date of the decree. Indeed, since the Legislature was intent on providing nonfault grounds for divorce and sanctioning divorce decrees where the marriage was dead—as attested by the specified two-year separation "it would be anomalous", two knowledgeable commentators in the field of marriage and divorce have observed, "to permit judicial termination of marriages which became dead after September 1, 1966, but not those whose demise preceded that date." (Foster and Freed, The Divorce Reform Law [1969], p. 18.) In other words, the legislative purpose of effectively reforming the State's divorce law would, to a large extent, be defeated by the restrictive judicial construction of subdivision (5) urged upon us by the defendants.

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7. Senator John H. Hughes, Chairman of the Judiciary Committee and one of the sponsors of the compromise bill finally enacted, stated, during debate on the Senate floor, that he had "legal advice" that it would be unconstitutional to provide for retroactive application of the living apart grounds and that, accordingly, the new law could not be applied to "old" separation decrees. (See Foster and Freed, The Divorce Reform Law [1969], p. 17.) However, the Chief Counsel to the Legislative Committee on Matrimonial and Family Laws, after noting that "the legislature must have intended that decrees obtained prior to September 1, 1967 qualify as the basis for such a divorce," went on to say that "[d]ecrees obtained after September 1, 1966 would appear to be qualified and it may be argued that decrees obtained prior to that date would be similarly satisfactory." (Commentary by Philip H. Schaeffer, Chief Counsel to Joint Legislative Committee on Matrimonial and Family Laws, Appendix A, Hendler, Matrimonial Practice in the New York Supreme Court [PLI, 1966], p. 203.)

In any event, if there could have been any doubt that subdivision (5), as originally enacted, was to be applied retroactively, that doubt was completely dispelled by the action taken by the Legislature in 1968. In that year, a bill was introduced which would have made both subdivision (5) and subdivision (6) expressly nonretroactive. More specifically, the bill recited—with respect to subdivision (5)—that the living apart had to be pursuant to a decree "*granted on or after September one, nineteen hundred sixty-six*" and—as to subdivision (6)—pursuant to an agreement "*subscribed and acknowledged on or after August first, nineteen hundred sixty-six*" (Sen. Intro. No. 2256, Assem. Intro. No. 2942). The Legislature, however, deleted the italicized clause from proposed subdivision (5) but retained it in subdivision (6), expressly making the latter provision nonretroactive (Assem. No. 2942-A). Thus, the Legislature deliberately and carefully differentiated between the two subdivisions, amending subdivision (6) alone to limit its applicabilty to separation agreements executed *after* August 1, 1966 (L. 1968, ch. 700).[8] In the light of the deletion of the provision relating to subdivision (5), "it is clear that it was understood that section 170 (5) had received retroversion" and was to be given "retroactive application." (Foster and Freed, The Conversion Ground for Divorce in New York, N. Y. L. J., April 30, 1969, p. 4, col. 2.)

The Joint Legislative Committee on Matrimonial and Family Laws—which had produced the original Wilson-Sutton divorce law bill (see 1966 Report, March 31, 1966; N. Y. Legis. Doc., 1966, No. 8, p. 85 *et seq.*)—voiced the same opinion. After observing that, "[a]s originally in-

8. The August 1st date was later changed to April 27th, 1966 (L. 1969, ch. 964).

troduced, this bill would also have provided that the separation ground for divorce based upon a judgment or decree of separation must have been one granted on or after September 1, 1966" and that "this limitation was deleted"; the committee categorically declared (McKinney's 1968 Session Laws of N. Y., vol. 2, p. 2308):

> "The bill as it now stands demonstrates a legislative intent to construe that provision [subd. (5)] as retroactive."[9]

As we have already pointed out, implicit in the statutory scheme is the recognition that it is socially and morally undesirable to compel a couple whose marriage is dead to remain subject to its bonds. If subdivision (5) were not to be applied retroactively, the legislative purpose would be seriously thwarted in the many cases in which spouses have been living separate and apart for more than two years pursuant to pre-1966 separation decrees, and the defendant in the separation action seeks a divorce. An insistence upon a fault-oriented ground of

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9. Contrary to the contention advanced, there can be no doubt concerning the propriety of considering the Legislature's action in 1968 in construing subdivision (5), even though that provision was originally enacted in 1966. It is sufficient to note, as the court did in *Schacht* v. *Schacht* (32 A D 2d 201, 203, *supra*), that, when the Legislature, modifying the proposed bill, chose to amend both subdivisions so as to prohibit the retroactive operation *only* of subdivision (6), and made both amendments effective immediately (L. 1968, ch. 700, § 3), "it clearly evinced *its* intent that subdivision (5), *as re-enacted in 1968*, be construed as retroactive." (Emphasis in original.) So clear an expression of legislative intent, the *Schacht* court continued (p. 203), "compels a holding * * * that subdivision (5) is retroactive and applicable to a living-apart pursuant to a separation decree obtained prior to the Divorce Reform Law." (See, also, *RKO-Keith-Orpheum Theatres* v. *City of New York*, 303 N. Y. 493, 501; *Matter of Chatlos* v. *McGoldrick*, 302 N. Y. 380, 387-388; cf. 1 Mertens, Law of Federal Income Taxation, §§ 3.28, 3.29.)

divorce, where the marriage, under the Legislature's present policy, ought to be dissolved, would for years perpetuate two of the chief evils the new divorce laws was designed to eliminate—collusive or fraud-ridden divorce actions in this State and the continued pursuit of out-of-state divorces based upon spurious residence and baseless claims. If, therefore, the legislative aims and purposes are to be achieved, the statute must be interpreted as making divorce available on living apart grounds pursuant to pre-1966 decrees just as it would be if the decree were obtained later and regardless of the "guilt" or "innocence" of the party seeking it.

This brings us to the constitutional arguments against retroactive application of subdivision (5). The principal contention is that a wife who prevailed in the separation action, having had no warning that the separation decree granted to her might later furnish basis or ground for divorce by the "guilty" husband would be deprived of valuable rights without notice. More particularly, it is claimed that those rights—social security and pension rights, inheritance rights and a right in the marital status itself—are "vested" and, by that token, protected by the Due Process and Equal Protection Clauses of both the Federal and New York Constitutions. These contentions lack substance.

A vested right, it has been said, is an "'immediate fixed right of present or future enjoyment'". (*Pearsall v. Great Northern Ry.*, 161 U. S. 646, 673.) Marital rights, however, have always been treated as inchoate or contingent and may be taken away by legislation before they vest. (See, e.g., *Maynard v. Hill*, 125 U. S. 190, 216; *Randall v. Kreiger*, 23 Wall. [90 U. S.] 137, 148.) In discussing the right of dower, the Supreme Court almost a cen-

tury ago wrote in the *Randall* case (23 Wall. [90 U. S.], at p. 148):

> "During the life of the husband the right [dower] is a mere expectancy or possibility. In that condition of things, the law-making power may deal with it as may be deemed proper. It is not a natural right. It is wholly given by law, and the power that gave it may increase, diminish, or otherwise alter it, or wholly take it away. It is upon the same footing with the expectancy of heirs, apparent or presumptive, before the death of the ancestor. Until that event occurs the law of descent and distribution may be moulded according to the will of the legislature."

By a parity of reasoning, a wife's prospective right of inheritance is inchoate and expectant, not becoming vested until the death of her husband. (See, e.g., *Simons v. Miami Beach Nat. Bank*, 381 U. S. 81, 85; *Matter of McGlone*, 284 N. Y. 527, 533, affd. *sub nom. Irving Trust Co. v. Day*, 314 U. S. 556.) "Since rights of descent and distribution of a decedent's estate are created by the law of the State," we wrote in *McGlone* (284 N. Y., at p. 533), "the State may change or take away such rights though it may not take away property which had vested by virtue of such rights." And, certainly, a spouse has no vested rights in the marital status (cf. *Rosenbaum v. Rosenbaum*, 309 N. Y. 371, 377; *Baumann v. Baumann*, 250 N. Y. 382, 385-389) or in social security or pension benefits.

In short, the State, having the power directly to limit or abolish rights of succession to the property of a living person, may undoubtedly do so indirectly by providing a new ground for divorce. Since, then, no vested rights of

the defendants have been adversely affected, there has been no denial of due process.

Likewise without merit is the defendants' equal protection argument that the Legislature, by making subdivision (5) retroactive and subdivision (6) prospective, unreasonably differentiated between a party to a pre-1966 separation *decree* and a party to a pre-1966 separation *agreement*. The short answer is that there is no denial of equal protection of the laws if the differentiation made rests upon some rational consideration and is not palpably arbitrary. "[T]he standards of equal protection", we recently declared, "are met if a classification, or a distinction among classes, has some reasonable basis." (*Matter of Bauch v. City of New York*, 21 N Y 2d 599, 607; see, also, *Bucho Holding Co. v. State Rent Comm.*, 11 N Y 2d 469, 477). The differences between separation decrees and separation agreements are numerous and fully justify the distinction which has been made. We need but mention that one is imposed by judicial fiat, whereas the other is the product of a voluntary undertaking; that one requires the intervention of the State, the other does not; that one is subject to modification, the other not; that the legal rights and remedies are to enforcement of the decree differ substantially from those available for breach of the agreement. Consequently, since there is reasonable basis for the legislative classification, the courts will uphold it even if they were to disagree with its wisdom.

Nor is there substance to the further contention that the statute unconstitutionally impairs contract rights. "Marriage is not a contract", we wrote in *Fearon v. Treanor* (272 N. Y. 268, 272, app. dsmd. 301 U. S. 667), "within the meaning of the provision of the Federal Constitution which prohibits the impairment by the States of the obligation of contracts." This being so, "rights

growing out of the [marriage] relationship may be modified or abolished by the Legislature without violating the provisions of the Federal or State Constitution which forbid the taking of life, liberty or property without due process of law." (*Hanfgarn* v. *Mark*, 274 N. Y. 22, 25, app. dmsd. 302 U. S. 641; see *Maynard* v. *Hill*, 125 U. S. 190, 210, *supra; Trustees of Dartmouth College* v. *Woodward*, 4 Wheat. [17 U. S.] 518, 629; see, also, 2 Cooley, Constitutional Limitations [8th ed. 1927], pp. 751-752.) And, in the *Dartmouth College* case, Chief Justice MARSHALL, addressing himself to the subject, stated (17 U. S., at p. 629): "The provision of the constitution never has been understood to embrace other contracts, than those which respect property, or some object of value, and confer rights which may be asserted in a court of justice. It never has been understood to restrict the general right of the legislature to legislate on the subject of divorces."

Before bringing this opinion to a close, we note that, when confronted with constitutional challenges such as those now urged upon us, the high courts of a number of jurisdictions have upheld the retroactive application of similarly constructed legislation permitting divorce either where the parties had been living apart pursuant to an "old" separation decree (see, e.g., *Stallings* v. *Stallings*, 177 La. 488; *Hagen* v. *Hagen*, 205 Va. 791) or where they had simply been living apart for a specified period. (See, e.g., *Tipping* v. *Tipping*, 82 F. 2d 828; *Fuqua* v. *Fuqua*, 268 Ala. 127; *Hurry* v. *Hurry*, 144 La. 877; *Campbell* v. *Campbell*, 174 Md. 229; *McGinley* v. *McGinley*, 295 S. W. 2d 913 [Tex.]. See, also, Ann., Divorce Statute—Retrospective Effect, 23 ALR 3d 626, 633-636.) "It has been held by the highest authority", wrote the Federal Court

of Appeals for the District of Columbia, "that marriage is an institution of society, creating a status which may be regulated and controlled by public law; that legislation affecting the institution or annulling the relation between the parties is not within the prohibition of the Constitution of the United States against the impairment of contracts, or against ex post facto laws." (*Tipping* v. *Tipping*, 82 F. 2d 828, 830, *supra*.)

It is perfectly obvious—as the facts in the cases before us establish—that "denial of legal recognition to *de facto* dissolution will not revive or reinstate the marriage as a functioning status." (1 Foster and Freed, Law and the Family [1969 Cum. Supp.], § 6:3-d, p. 30.) If the loss of the wife's *prospective* right of inheritance is thought to occasion economic inequity when the husband converts the separation decree into a divorce, redress or alleviation must be left to the Legislature. That body could, if so minded, amend the law so as to grant discretion to the courts to award her an amount in lieu of such prospective inheritance right. Be that as it may, the simple fact is that the larger public interest demonstrated by the present legislation requires that there be a legal termination of dead marriages.

It has been well said that "[a] giant step has been taken in the Divorce Reform Law to bring New York into the twentieth century." (Gershenson, The Divorce Reform Law, N. Y. L. J., July 26, 1967, p. 4, col. 6.) The courts should not dilute its effectiveness by denying it the full scope intended for it. It applies retroactively, as we have declared, to permit divorce on the strength of a separation decree rendered before the new statute was enacted and, as so construed, it does not violate any constitutional provision.

In each case, the order appealed from should be reversed, without costs, and the case remitted to the Supreme Court, New York County, for further proceedings in accordance with this opinion.

Judges BERGAN, BREITEL, JASEN and GIBSON concur with Chief Judge FULD; Judges BURKE and SCILEPPI dissent and vote to affirm on the prevailing and concurring opinions at the Appellate Division.

In each case: Order reversed, etc.

APPENDIX B

JACKIE GLEASON, Respondent, *v.* GENEVIEVE GLEASON, Appellant.

ELI GOLDSTEIN, Appellant, *v.* BEATRICE GOLDSTEIN, Respondent.

Appellate Division—First Department, July 1, 1969.

EAGER, J. P. There is presented on these appeals the common question of law whether subdivision (5) of section 170 of the Domestic Relations Law should be applied retroactively to authorize a divorce on the basis of a living apart of the parties pursuant to the terms of a judgment of separation rendered prior to the effective date of the Divorce Reform Law.

In Gleason, the parties, married in 1936, entered into an agreement of separation on June 16, 1954, and, thereafter, on June 22, 1954, a judgment of separation was rendered and entered in favor of the wife and against the husband on the ground of abandonment and nonsupport. The judgment approved, ratified and confirmed the separation agreement. The husband brought this present action of divorce in October, 1968, alleging that two years had elapsed since the said judgment of separation was entered; that the parties had lived separate and apart since the rendition of the judgment; and that the husband has in all respects complied with the terms and conditions of the judgment. The wife, as a defendant in this divorce action, moved to dismiss the complaint for insufficiency and on the ground of validity as a matter of law of certain defenses, and the plaintiff husband cross-moved to strike certain defenses in the wife's answer, including her

allegations that subdivision (5) of section 170 was not constitutionally and legally applicable as a basis for the action. Special Term denied the wife's motion and granted the husband's cross motion, and the wife appeals.

In Goldstein, the parties were married in 1944 and a judgment of separation was rendered on May 17, 1960 in favor of the wife, decreeing separation on the ground of the husband's failure and refusal to support the wife and the children of the marriage. In September, 1968, the husband brought this action for divorce, alleging that the plaintiff and defendant had lived apart continuously since the rendition of said judgment of separation and that the plaintiff has substantially performed all of the terms and conditions of said judgment. On the motion of the wife, the defendant in this divorce action, Special Term has rendered an order dismissing the complaint and the plaintiff husband appeals.

Thus, in these two cases, we have inconsistent decisions on the question of whether a decree of separation, rendered prior to the effective date of the Divorce Reform Law, may be converted into a judgment of absolute divorce on the basis of the living apart of the parties pursuant to such decree. In fact, the conflicting reasoning of the Justices at Special Term in these cases is merely representative of the divergent views expressed at nisi prius by the courts throughout the State.

The pertinent statute (Domestic Relations Law, § 170) reads:

"An action for divorce may be maintained by a husband or wife to procure a judgment divorcing the parties and dissolving the marriage on any of the following grounds:

"(5) The husband and wife have lived apart pursuant to a decree or judgment of separation for a period of two years after the granting of such decree or judgment, and satisfactory proof has been submitted by the plaintiff that he or she has substantially performed all the terms and conditions of such decree or judgment."

Although, as literally read, the statute in its general wording could be understood to apply retroactively in the cases of pre-existing judgments of separation, we conclude that such a construction is neither required nor authorized.* "Even where the words are so general and broad as in their literal sense to comprehend existing cases, they must yet be construed as applicable only to such as may thereafter arise, unless the intention to embrace all is plainly and unequivocally expressed, and if all the language of a law can be satisfied by giving it a prospective operation only, it should not apply retrospectively." (McKinney's Cons. Laws of N. Y., Book 1, Statutes, § 51, pp. 67-71.) In accordance with the general rule, this statute should "not be given a retroactive effect when it is capable of any other construction." (*Walker* v. *Walker*, 155 N. Y. 77, 81.)

The legislative intent controls as to whether the statute is to be given a retroactive application; " 'words ought to be made subservient to the intent, not contrary to it.' " (*Matter of Young* v. *Gerosa*, 11 A D 2d 67, 74.) "It is a settled rule of statutory construction that the provisions

* This conclusion was reached and this opinion was written prior to the release of the decisions in the Second Department on June 18, 1969 in *Zientara* v. *Zientara* (32 A D 2d 822) and *Schacht* v. *Schacht* (32 A D 2d 201). We have considered and reviewed such decisions but adhere to our conclusions based on the reasoning in this and the concurring opinion.

of a statute will not be applied retrospectively where they are capable of any other construction unless the intent of the Legislature to the contrary clearly appears (*New York & Oswego Midland R. R. Co.* v. *Van Horn*, 57 N. Y. 473, 477; *Walker* v. *Walker*, 155 N. Y. 77, 81)." (*Waddey* v. *Waddey*, 290 N. Y. 251, 254.)

The words not being decisive on the question of legislative intent, we may review and consider legislative history and documents, but, here, the available data, as reviewed in the decisions and law notes, is confusing and indecisive. (See, e.g., *Zientara* v. *Zientara*, 59 Misc 2d 344, revd. 32 A D 2d 822; *Yoli* v. *Yoli*, 55 Misc 2d 416; also, the Conversion Ground for Divorce in New York by Henry Foster, Jr. and Doris Freed, N. Y. L. J., April 30, May 1 and May 2, 1969.) Certainly, we may not arrive at a conclusion on the basis of speculation as to the reasons why the 1968 Legislature did not act upon proposed legislation which would have expressly limited the application of subdivision (5) to a judgment or decree of separation existing on or after September 1, 1966. Legislative inaction is but a "weak reed upon which to lean in determining legislative intent." (*Flanagan* v. *Mt. Eden Gen. Hosp.*, 24 N Y 2d 427, 433.) In any event, it is the legislative intent of 1966 rather than the intent of the Legislature in 1968 that should control the determination here. (See *Abelson* v. *Abelson*, 59 Misc 2d 172; *Zientara* v. *Zientara*, *supra*; cf. *Schacht* v. *Schacht*, 32 A D 2d 201.)

Where there is ambiguity in a particular legislative enactment and in the recorded legislative data appertaining thereto, a reference to the legislative policy in relation to the subject matter of the statute may be helpful in determining legislative intent. Where a statute has long expressed the legislative policy in a particular area, it may

be assumed that a substantial amendment of its terms, where representing a change in such policy, was intended to be confined to a wholly prospective operation. In this connection, we know that, as a matter of settled public policy, the State looks with favor upon the continuance of the marriage relation and we know that the legislative policy, long adhered to, was to confine the granting of an absolute divorce to the one ground of adultery. It was considered in the public interest not to permit the severing of the marital ties on the grounds of desertion, cruelty or incompatibility. (See 16 N. Y. Jur., Domestic Relations, § 909.) Thus, the 1966 statute represents a drastic change in legislative policy in the matter of divorce and, therefore, there is every reason for regarding it as coming within the general rule that statutes shall not operate retroactively unless the wording thereof expressly so requires.

It may be argued that it is contrary to the policy initiated by the new divorce law to arrive at a construction of subdivision (5) that provides no relief to the many spouses who have been living apart pursuant to separation judgments granted prior to the enactment of the new law. It is argued that in many such cases the marriage is clearly "dead" and that it is inequitable and discriminatory to deny a spouse to such a marriage the same rights which would follow in a case where there is a living apart pursuant to a judgment of separation rendered following the effective date of the new law. These arguments, however, as a ground for inferring a legislative intent to give subdivision (5) of section 170 a retroactive application appear unconvincing when it is noted that the Legislature has expressly provided that subdivision (6) of the same section shall be limited to apply in the cases

of separation agreements entered on or after August 1, 1966. "If the policy underlying our divorce law is a sound one, it would require that both conversion grounds be treated the same as to retroactivity. Sociologically it is very difficult to defend a policy which gives recognition retroactively to 'dead marriages' reflected by a separation decree but does not give similar recognition to 'dead marriages' which have been formalized by separation agreements prior ot August 1, 1966, and which completely ignores the 'dead marriages' of parties who have been separated for years without the formality of either a written agreement or a judicial separation decree. The possibility of fraud may explain the exclusion of this latter type of 'dead marriages' but does not explain the limitation on 'dead marriages' represented by separation agreements." (*Zientara* v. *Zientara*, 59 Misc 2d 344, 352, *supra*, revd. 32 A D 2d 822.)

Nor is there firm support for the argument that the statute should apply to pre-existing judgments of separation because it is remedial in its effect. Clearly, the statute is not remedial in the sense justifying an inference that the Legislature intended retroactive operation. (See *Abelson* v. *Abelson*, 59 Misc 2d 172, *supra*.) In creating the remedy of divorce in cases where such remedy did not theretofore exist, it permitted the destruction of rights arising out of a marital contract. "Where the effect of the statute 'is to create a right of action' which did not previously exist, it is presumed that the statute was intended to have only prospective application. (See *Jacobus* v. *Colgate*, 217 N. Y. 235, 240-242.)" (*Longines-Wittnauer* v. *Barnes & Reinecke*, 15 N Y 2d 433, 453.) "Statutes are generally to be construed as prospective only, even if remedial, where a new right is established",

(*Lewittes & Sons* v. *Perlow*, 254 App. Div. 94, 95; see, also, *Feiber Realty Corp.* v. *Abel*, 265 N. Y. 94.)

The statute in fact "represents a far-reaching substantive change in the law" (*Abelson* v. *Abelson*, 59 Misc 2d 172, 180, *supra*). A judgment of separation, as well understood prior to the enactment of the Divorce Reform Law, merely effected a modification and suspension in certain respects of the marriage relations, duties and obligations. Notwithstanding such a judgment, the marital contract continued in existence and the obligations incident thereto were binding upon the parties except as modified by the decree. The decree left open the opportunity for reconciliation of the parties with a presumption of full marital relations and the re-establishment of the family unit. Thus, a judgment of separation was in a sense an exemplification of the policy of this State, namely, that the marital relation, with the possibility of reconciliation of separated spouses, be continued as long as possible. (See 16 N. Y. Jur., Domestic Relations, § 823.)

Furthermore, many rights and obligations incident to the marital ties generally remain following a judgment of separation, including rights and obligations with reference to support and maintenance of a spouse, testamentary rights and restrictions including the right of a nonguilty spouse to elect against the last will and testament of the other, health insurance and pension rights, and rights under social security and immigration laws.

The Legislature is presumed to have known that, at the time of the enactment of the new law, there was in existence a great number of separation judgments which were then outstanding of record throughout the State.

"If it was the purpose and intent to attach so new and radical an effect to the many existing separation judgments, such a determination should come from the Legislature in clear and unmistakable language and not as the result of judicial construction on the basis of legislative silence. (McKinney's, Statutes, §§ 74 and 153; Crawford, Construction of Statutes [1940], § 168, p. 268.) Furthermore * * * there is an inherent injustice, aside from constitutional considerations in grafting on existing separation judgments the unforeseen legal consequences which retroactive application of subdivision (5) of section 170 would necessarily entail. 'But considerable care should be exercised in order that a judgment secured before the enactment of the regulatory statute may not be impaired, destroyed or extended. In fact, no statute should receive a construction which will impair an existing judgment or enlarge or validate it in any way. As a result, in case of doubt, statutes affecting judgments should be regarded as applying to subsequently secured judgments only.' (*Crawford, supra*, § 293, pp. 591-592)." (*Abelson* v. *Abelson*, 59 Misc 2d 172, 180-181, *supra;* see, also, 82 C. J. S., Statutes, § 416; *Livingston* v. *Livingston*, 173 N. Y. 377; *Feiber Realty Corp.* v. *Abel, supra; Matter of Greene*, 55 App. Div., 475, 482, affd. 166 N. Y. 485, 492.)

To apply subdivision (5) in the case of pre-existing judgments of separation amounts to the automatic broadening of the effect of such judgments and tends to destroy rights thereunder. Such retroactive application would confer authority upon the courts to dissolve a marriage without the consent of a nonguilty party who obtained the judgment of separation and without proof of any breach of the marital contract on his part. It is questionable whether the State may constitutionally do this. (See

Church v. *Church*, 58 Misc 2d 753; *Shapiro* v. *Shapiro*, 59 Misc 2d 412.)

Here, the Legislature, in enacting a new divorce law, was looking to the future. By the terms of its enactment, the maintenance of an action for divorce was authorized where the spouses have lived apart for a period of two years "after the granting of" the judgment of separation. These words import a future happening—the "granting" of a judgment of separation as an event which, occurring in the future, would serve as a condition precedent to the obtaining of a divorce on a ground of a mere living apart of the parties. The existence of a separation judgment was made an essential element of the "cause", or ground for a divorce; absent such a judgment (or a separation agreement), a living apart of spouses does not furnish a basis under the new law for a divorce. In providing for a law effective prospectively, we know that there was no intent on the part of the Legislature to legislate into existence divorces on the basis of prior events. Thus, we should apply the universal rule, that a "statute declaring the causes for which divorces may be granted is ordinarily to be given a prospective operation only and does not authorize a divorce for a specified cause which occurred before the statute was enacted." (27A C. J. S. Divorce, § 16; 19 C. J., Divorce, § 62, and many cases cited in the notes.)

If the Legislature intended that the new law should apply in the cases of existing judgments of separation, it could have easily so provided, and its failure to do so is significant. The grounds for a divorce of a husband and wife must be founded on statutory provision and the court may not implement the law by supplying a provision for a particular retroactive application not speci-

fied by the Legislature. Furthermore, the application of the law to pre-existing judgments of separation would require implementation to provide standards and guidelines under which a nonguilty spouse may be protected from or compensated for the loss of still existing marital rights (see Foster & Freed, N. Y. L. J., *supra*; *Taplinger* v. *Taplinger*, 55 Misc 2d 103; *Bessowitz* v. *Bessowitz*, N. Y. L. J., June 3, 1969, p. 19, col. 1; *Di Russo*, 55 Misc 2d 839); and this, particularly, is a legislative function. In this connection, the "court may not substitute itself for the Legislature, merely because the Legislature has failed to act." (Cf. *Matter of Spillane* v. *Katz*, 25 N Y 2d 34, 37.) In any event, here, the purpose of the new legislation may be fulfilled without giving subdivision (5) the contended for retroactive effect and, thus, the law should not be construed to so operate.

In Gleason, the order, entered March 13, 1969, should be reversed, on the law, with costs and disbursements, and defendant's motion to dismiss complaint granted. In Goldstein, the order, entered March 31, 1969, and the judgment, entered April 11, 1969, should be affirmed, with costs and disbursements.

McNally, J. (concurring). I concur, but would add the following grounds:

In two actions for divorce, defendant wife Gleason appeals from the order denying her motion to dismiss the complaint and granting plaintiff's cross motion to dismiss the first and second affirmative defenses, and plaintiff husband Goldstein appeals from the dismissal of his complaint. On June 22, 1954 and May 17, 1960, defendants respectively were awarded decrees of separation. Predicated thereon, plaintiffs, defendants in the separation

actions; seek divorces under subdivision (5) of section 170 of the Domestic Relations Law (added by L. 1966, ch. 254). Subdivision (5) enables a divorce on the ground that the parties have lived apart pursuant to a judgment of separation for the period of two years thereafter.

An action for divorce also may be maintained under subdivision (6) of section 170 if the parties have lived apart pursuant to a separation agreement made after August 1, 1966. The other four subdivisions of section 170 set forth grounds for divorce based on defendant's fault.

Subdivision (6) is prospective in its application. Plaintiffs contend, however, subdivision (5) is retroactive, although it does not so provide. To the extent that subdivision (5) retroactively applies to defendants, it offends against the equal protection clause of the United States and New York State Constitutions (U. S. Const., 14th Amdt., § 1; N. Y. Const., art. I, § 11), and deprives defendants of their inchoate property rights and status rights conferred by the judgments of separation. (*Livingston* v. *Livingston*, 173 N. Y. 377, 383; *Germania Sav. Bank* v. *Village of Suspension Bridge*, 159 N. Y. 362.)

Section 170 provides two nonfault grounds for divorce. They are set forth in subdivisions (5) and (6). That grounded on a separation agreement (subd. [6]) is based on the consent of the parties given subsequent to its enactment. Thereby the parties to the agreement impliedly consent to the divorce thereafter made possible by the lapse of two years. The provision for divorce based on a prior separation decree (subd. [5]) in these cases obtained by defendants imposes the divorce on them to their detriment. In addition, subdivision (5) retroactively bestows on plaintiffs the right to a divorce which they did not have

prior to its enactment and would not have been available to plaintiffs but for the decrees obtained by defendant wives based on plaintiff husband's misconduct. Thus, defendants, without their consent, are sought to be saddled with divorces they did not and would not seek if they had been apprised of their exposure to involuntary divorces at the time they sought and obtained their separation decrees. We cannot reasonably presume the Legislature, in the absence of clear and explicit language, ever intended such a harsh and unjust result. Thus, subdivision (5) is palpably discriminatory as to defendants who have been awarded separation decrees in failing to make available to them the right to consent or object to the divorce. Subdivision (5) also impairs the prior separation decree in that it makes it available to the guilty party as a sword against the nonconsenting successful party. (*Livingston* v. *Livingston*, 173 N. Y. 377, *supra*.)

MARKEWICH and NUNEZ, JJ. (dissenting). We dissent, and, in accordance with the clear mandate of subdivision (5) of section 170 of the Domestic Relations Law, would affirm in Gleason and reverse in Goldstein, sustaining the validity of the complaint in each instance.

The facts and the applicable statute, as well as summaries of the holdings at Special Term, have been fairly set forth in the opinions of the majority and require no repetition here. Our disagreement is with the conclusions derived therefrom. "None of us ought to make the parties' case better than the law has made it." (*The Bankers' Case*, 14 Howell State Trials 39, 45, Somers [1700]), but this is what the majority has done. "Under the doctrine of separation of powers, it is fundamental that the courts may not extend, enlarge, or expand legislation. The courts

should not attempt to read into a statute words or provisions or meanings which are not there. * * * Rules of construction are invoked only when the language used in a statute leaves its purpose and intent uncertain and questionable, and not for judicial enlargement of or extension of the legislative design or intent. A court may not read into statutes what the legislature intended should be left out, nor read into a statute words not used by the legislature which would defeat the purpose of the statute in part." (56 N. Y. Jurisprudence, Statutes, § 107, pp. 584-585, and the numerous cases there cited.) This is precisely what the majority has done.

The complaint in each case sets forth in accurate paraphrase the language of the statute (Domestic Relations Law, § 170, subd. [5]), pursuant to which relief is sought by way of judgment of divorce. For the purposes of the motion to dismiss for insufficiency, the allegations must be deemed true. So read, each complaint clearly sets forth a cause, pleaded pursuant to the statute, i.e., that the parties "lived apart pursuant to a decree or judgment of separation for a period of two years after the granting" thereof and that "plaintiff * * * has substantially performed all the terms and conditions" thereof. It is beyond dispute that each plaintiff has followed the time-honored, usually unassailable method of assuring a sufficient pleading by "pleading the statute." The difficulty is that the majority has imported into the statute a nonexistent restraint upon its thrust; a plaintiff may not, it is claimed, employ as the predicate judgment of separation, sought to be converted into divorce, one that preceded in time the effective date of the statute. In short, it is said, the statute is prospective only in applicability. Much is said about legislative intent and surrounding circumstances.

but not a word is said to contradict the statute's clear and unambiguous words. Indeed, if anything at all, the statute's brief history points in the opposition direction.

Subdivision (5) of section 170 (conversion of separation judgment into judgment of divorce) and subdivision (6) (conversion of separation agreement into divorce judgment) were enacted simultaneously in 1966 (L. 1966, ch 254); the only limitation of time of any kind then imposed was that, in neither case, could the two-year period of living apart specified in both subdivisions "be computed to include any period prior to September first, nineteen hundred sixty-six" (L. 1966, ch. 254, § 15). In 1968, subdivision (6) *alone* was amended to limit its conversion provisions to agreements of separation "subscribed and acknowledged on or after August first, nineteen hundred sixty-six" (L. 1968, ch. 700). The memorandum in the 1968 Report of the Joint Legislative Committee on Matrimonial and Family Laws to the Legislature of the State of New York (March 31, 1968, p. 55) recites legislative intent as to the amendment: "The living apart ground for divorce based upon an agreement of separation is being amended to recite that the agreement must be one subscribed and acknowledged on or after August 1, 1966. This language is being added in order to clearly show that there is no legislative intent that this section have retroactive effect." Then going on to speak of subdivision (5): "As originally introduced, this bill would also have provided that the separation ground for divorce based upon a judgment or decree of separation must have been one granted on or after September 1, 1966. By amendment, this limitation was deleted. The bill as it now stands, demonstrates a legislative intent to construe that provision as retroactive."

The concurring opinion for the majority adds other grounds to a claim of restriction to prospectivity in application. The claim that subdivision (5) of section 170 is an unconstitutional deprivation of appellants' right of due process of law is without merit. The section does not violate that constitutional guarantee. Apparently, appellants' greatest concern is that conversion of the separation decree into divorce at the behest of the guilty husbands will deprive the wives of rights to inherit as surviving spouses. However, there is no such right entitled to the protection of the due process clause. (*Simons* v. *Miami Beach Nat. Bank*, 381 U. S. 81). As Judge KORN stated at Special Term:

"There are no vested rights to inherit. At best one spouse has a mere expectancy in the estate of another.

"Additionally, there is no 'vested' right that a spouse has arising either out of contract or out of the marital status to remain married to his or her partner".

Due process protection is afforded only to vested property rights, not to mere expectations. (*Irving Trust Co.* v. *Day*, 314 U. S. 556, affg. *Matter of McGlone*, 284 N. Y. 527; *Randall* v. *Kreiger*, 23 Wall. [90 U. S.] 137). "Since rights of descent and distribution of a decedent's estate are created by the law of the State, the State may change or take away such rights though it may not take away property which had vested by virtue of such rights." (*Matter of McGlone*, *supra*, p. 533). And, since the State may limit, change or abolish rights of succession to the property of a living person directly, it certainly may do so by providing new grounds for divorce. And, as to those rights which have vested, for instance as provided in the Gleason situation for the payments to the wife to continue

into the future, there will be no interference whatever by a decree of divorce.

The concurring opinion speaks of unconstitutional discrimination. In so doing, the majority itself discriminates as between conversion of judgments and conversion of agreements by raising, though the words are not used, the same concept of "fault" and "guilty spouse" stressed as a make-weight in the Goldstein opinion at Special Term. The Legislature never intended to make "fault" a criterion by which the right of conversion divorce is to be measured. Indeed, a bill to that end failed of passage in the 1969 session. (See Association of Bar of City of N. Y., Committee on State Legislation, Bulletin No. 5, March 10, 1969, pp. 231-233.) "The court may not substitute itself for the Legislature merely because the Legislature has failed to act." (*Matter of Spillane v. Katz*, 25 N Y 2d 34, 37.) Further, it is interesting to observe that the law school professor assigned as reporter to the topic "Matrimonial and Family Law" at the 1967 Conference of New York State Trial Judges (Crotonville) Thirteenth Annual Report N. Y. Judicial Conference, 1968, p. 115; N. Y. Legis. Doc., 1968, No. 90, p. 115, participated in by approximately one hundred trial, and some appellate Judges, from all over the State, wrote: "The new 'living apart' or conversion grounds next received the panel's attention in terms of the following specific question: is the right to transform a judicial separation into a divorce available equally to the innocent spouse and the guilty spouse in the underlying separation action? There was a consensus that this right of conversion is not under existing law limited to the innocent party in the separation action."

The 1966 "Committee Report on Recommended Amendments to the Divorce Reform Law of 1966" of the Special

Committee on Matrimonial Law of the Association of the Bar of the City of New York speaks, under the heading "Inheritance Rights of Divorced Innocent Spouse" (Record of Assn. of Bar of City of N. Y., vol. 21, [1966], p. 598), only of the necessity of desired legislation to protect the property rights of such a spouse, stating the problem: "Under the provisions of Section 170(5) of the Act an action for divorce may be maintained by a husband or wife where they have lived apart pursuant to a decree of separation for a period of two years after the granting of such decree and satisfactory proof has been submitted by the plaintiff that he or she has duly performed all the terms or conditions of such decree. The operation of this provision may produce an inequitable result in certain cases by depriving a faultless spouse who has procured a judgment of separation without any desire of divorcing his or her spouse of the right to share in the other spouse's estate." The report goes on to recite certain aspects of the problem, incidentally repeating specifically that the faultless spouse may well be the losing defendant in the conversion divorce action, and recommends remedial action, not by way of restricting the right to sue in a conversion action to the faultless spouse, but assuring her property rights, particularly under the Decedent Estate Law. Obviously, fault is not considered a factor in the right to conversion divorce. See, to the same effect, The Judicial Conference's 1967 "Memorandum on Recommended Changes in the 'New Divorce Law' ", referring to chapter 254 of the Laws of 1966 (p. 29 *et seq.*).

The majority's concurring opinion also protests what it terms unconstitutional discrimination against those who brought separation actions prior to the change in law because the eventual result of conversion divorce might not be in accord with their original intentions. There is

no right of contract involved here and the State obviously has the power, here exercised, to change its policy for the common good. Nor, actually, is there any greater discrimination, if there is any at all, than that which is accepted as a matter of course in the advantages generally accorded by matrimonial laws to women over men.

Finally, and without yielding to the temptation to excerpt generously therefrom, we can do no better in evaluating the position taken by the majority than to point to the unanimous opinion of our breathren in the Second Department, per BENJAMIN, J., to the same effect as our dissent (*Schacht* v. *Schacht*, 32 A D 2d 201).

In sum, the complaints were properly drawn pursuant to a constitutional, clear and unambiguous statute, and should be sustained.

McNALLY and McGIVERN, JJ., concur with EAGER, J. P., in opinion by McNALLY, J.; MARKEWICH and NUNEZ, JJ., dissent in opinion.

Order in the first above-entitled action entered March 13, 1969, reversed, on the law, with $50 costs and disbursements to the appellant, and defendant's motion to dismiss the complaint granted; the Clerk is directed to enter judgment in favor of the defendant dismissing the complaint with costs.

Order in the second above-entitled action entered on March 31, 1969, and judgment entered thereon, affirmed, with $50 costs and disbursements to the respondent.

Appendix B

Frederick E. Winkler, Appellant, v. Marie F. Winkler, Respondent.—Order entered March 24, 1969, and judgment entered March 28, 1969, unanimously affirmed, without costs or disbursements. (See Gleason v. Gleason, 32 A D 2d 402.) Concur—Eager, J. P., Capozzoli, McGivern, Markewich and Nunez, JJ.

APPENDIX C

ORDER OF SPECIAL TERM NEW YORK SUPREME COURT

COUNTY OF NEW YORK

SPECIAL TERM, PART XII

Index Number 33101/68

Present:

HON. HARRY B. FRANK
Justice.

[SAME TITLE]

The following papers 1-7 read on this motion, argued Nov. 23, 1968.

	Papers Numbered
Notice of Motion, Pleadings and Affidavits Annexed	1-7

Plaintiff in this action for a "conversion" divorce pursuant to subdivision (5), Section 170 of The Domestic Relations Law having been adjudged the guilty party in a separation decree which was entered in December 1960, subdivision (5) may not be retroactively applied (see decision in Shapiro v. Shapiro decided simultaneously herewith) and the motion to dismiss the complaint is granted.

Settle order.

H. B. F.
J. S. C.

Dated March 7, 1969

Brief in Support
Brief in Opposition
Memorandum Only
Filed Mar 24 1969
Co. Clerk's Office New York

APPENDIX D

§ 170 DOMESTIC RELATIONS LAW OF NEW YORK

§ 170. Action for divorce

An action for divorce may be maintained by a husband or wife to procure a judgment divorcing the parties and dissolving the marriage on any of the following grounds:

(1) The cruel and inhuman treatment of the plaintiff by the defendant such that the conduct of the defendant so endangers the physical or mental well being of the plaintiff as renders it unsafe or improper for the plaintiff to cohabit with the defendant.

(2) The abandonment of the plaintiff by the defendant for a period of two or more years.

(3) The confinement of the defendant in prison for a period of three or more consecutive years after the marriage of plaintiff and defendant.

(4) The commission of an act of adultery, provided that adultery for the purposes of articles ten, eleven, and eleven-A of this chapter, is hereby defined as the commission of an act of sexual or deviate sexual intercourse, voluntarily performed by the defendant, with a person other than the plaintiff after the marriage of plaintiff and defendant. Deviate sexual intercourse includes, but not limited to sexual conduct as defined in subdivision two of Section 130.00 and subdivision three of Section 130.20 of the penal law.

(5) The husband and wife have lived apart pursuant to a decree or judgment of separation for a period of two years after the granting of such decree or judgment, and

satisfactory proof has been submitted to the plaintiff that he or she has substantially performed all the terms and conditions of such decree or judgment.

(6) The husband and wife have lived separate and apart pursuant to a written agreement of separation, subscribed and acknowledged on or after April twenty-seventh, nineteen hundred sixty-six by the parties thereto in the form required to entitle a deed to be recorded, for a period of two years after the execution of such agreement and satisfactory proof has been submitted by the plaintiff that he or she has substantially performed all the terms and conditions of such agreement. Such agreement shall be filed in the office of the clerk of the county wherein either party resides within thirty days after the execution thereof. Added L. 1966, c. 254, § 2; amended L. 1967, c. 648, § 1; L. 1968, c. 700, §§ 1, 2).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 514

MARIE F. WINKLER,

Petitioner,

against

FREDERICK E. WINKLER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR THE RESPONDENT

JOHN E. HIGGISTON, JR.,
Attorney for Respondent,
29 Broadway,
New York, N. Y. 10006.

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IN THE

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ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR THE RESPONDENT

Opinions Below

The opinions, decisions and orders in the Courts below are as set forth in the petition and the appendix thereto.

Jurisdiction

In this case petitioner seeks review of an order of the Court of Appeals of the State of New York. The order reversed a lower Court's order granting petitioner's motion to dismiss the complaint in a divorce action and remitted the case to the New York Supreme Court for further proceedings. Jurisdiction is invoked under 28 U.S.C.

§ 1257(3) on the ground that the order of reversal is a final order drawing into question the constitutionality of a state statute. The order of the Court of Appeals was entered on May 13, 1970. The petition for certiorari was filed on August 10, 1970.

Questions Presented

1. Whether an order of a State court reversing a lower court's order granting a motion to dismiss a complaint in a divorce action and remitting the case to the trial court for further proceedings is a final judgment or decree subject to review by this Court under 28 U.S.C. § 1257.

2. Whether the application of the "nonfault" provision of the New York divorce statute, Domestic Relations Law § 170 subd. (5), enacted in 1966 and effective September 1, 1967, to parties living apart pursuant to a separation judgment made on December 15, 1960, violates the constitutional rights of the successful party to the separation action where that party does not wish a divorce.

WHY CERTIORARI SHOULD NOT BE GRANTED

I

The order of the New York Court of Appeals is not a final judgment subject to review.

Under U.S.C. § 1257 this Court has power to intervene in State litigation only after "the highest court of a State in which a decision could be had" has rendered a "final" judgment or decree.

"This requirement," Mr. Justice Frankfurter has warned, "is not one of those technicalities to be easily scorned. It is an important factor in the smooth working

of our Federal system". *Radio Station WOW, Inc.* v. *Johnson*, 326 U. S. 120, 123. Especially is this true where the judgment of the State court is one dealing with family relations, an area traditionally reserved to the courts and legislatures of the several States.

The question in each instance is whether, as a consequence of the judgment of the State court, "there is nothing more to be decided". *Clark* v. *Willard*, 292 U. S. 112, 118. The judgment "must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein". *Market Street Railway Co.* v. *Railroad Commission of California*, 324 U. S. 548, 551.

If there is no such showing then the case must fall within "that small class which finally determines claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated". *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541, 546; *Local No. 438* v. *Curry*, 371 U. S. 542, 549.

This is not such a case. The order of the New York Court of Appeals did not effectively terminate the litigation. What it did do was to reverse a lower court order granting defendant's motion to dismiss the complaint and remit the case to the trial court for further proceedings. These further proceedings include answering the complaint, conduct of pre-trial proceedings, trial, and the entry of judgment after trial.

Nor may it be properly claimed, as petitioner suggests (Petition, p. 6), that the order deprived petitioner of her only defense to the action, left the trial court with nothing more to decide and relegated it to the mere ministerial duty of entering judgment. Cfr. *Pope* v. *Atlantic Coast*

Line Railroad Co., 345 U. S. 379, 382; *Mills* v. *Alabama*, 384 U. S. 214, 217; *Richfield Oil Corp.* v. *State Board of Eq.*, 329 U. S. 69, 73.

This is apparent from the local law which the Court may properly look to in determining the question of finality. *Richfield Oil Corp.* v. *State Board of Eq.*, 329 U. S. 69, 72.

Thus, under the very statute under which this divorce action was brought (Domestic Relations Law § 170 subd. (5)), a jurisdictional prerequisite to the maintenance of the action is proof "by the plaintiff that he or she has substantially performed all the terms and conditions of such decree or judgment", i.e., the separation judgment pursuant to which the parties have lived apart. As recently as August 4, 1970, when issue was first joined and petitioner served her verified answer in the divorce action, she denied this jurisdictional allegation of the complaint and, on the basis of that denial, demanded judgment dismissing the complaint. How could it possibly be claimed, therefore, at this posture of the divorce action, that petitioner has been deprived of her only defense or that "there is nothing more to be decided"?

Furthermore, even if it be true, as petitioner suggests, that she has no affirmative defense and that the trial of the action will necessarily result in the entry of a judgment of divorce, this does not mean that petitioner has sustained or will sustain injury or that the constitutional issues sought to be raised here are now ripe for determination. Under applicable provisions of New York law (Domestic Relations Law § 236), the trial court in a divorce action has broad and continuing discretionary powers to provide financially for a divorced wife. Until such time as the trial court has exercised or refused to exercise that discretion in conjunction with the entry of a final decree of divorce, there is no conceivable basis for finding that a "final" judgment reviewable under U.S.C. § 1257 exists. It is only at

that point that intervention by this Court would be proper, for only then will it be possible to say "the suit is at an end" and "there is nothing more to be decided". *Clark* v. *Willard, supra,* at 118.

II

The petition presents no substantially arguable Federal question.

The application of Domestic Relations Law § 170 subd. (5), effective September 1, 1967, to parties living apart pursuant to a separation decree made on December 15, 1960, offends neither due process, equal protection nor the impairment of contracts provisions of the United States Constitution. *Gleason* v. *Gleason,* 26 N. Y. 2d 28.

First, because marriage is not a contract within the constitutional provisions prohibiting the impairment of contracts *Maynard* v. *Hill,* 125 U. S. 190, 216; *Dartmouth College* v. *Woodward,* 4 Wheat. (U. S.) 518, 629; *Hanfgarn* v. *Mark,* 274 N. Y. 22, 25, remittitur amended 274 N. Y. 570, appeal dismissed 302 U. S. 641; secondly, because the legislation so applied does not deprive petitioner of any property interests that are protected by constitutional guarantees of due process; and finally, because the statutory classification is entirely reasonable and proper.

In actual fact, all of the so-called "property rights", which petitioner claims (Petition, p. 7) she has been deprived of by this legislation, are not property rights at all. They are mere expectancies granted by the legislative power as an incident to the marriage relationship and subject to modification or revocation by it at any time. *Maynard* v. *Hill, supra,* at 216; *Randall* v. *Kreiger,* 23 Wall. 137, 148; *Gleason* v. *Gleason, supra,* at 26 N. Y. 2d 40.

The due process clauses are concerned with the protection of vested rights and interests, not mere inchoate rights

or expectancies, and no person has a vested right in a continuance of the law, unchanged, with respect to the marital relationship and inchoate legal rights and incidents growing out of it. *Addison* v. *Kilgore*, 145 U. S. 487, 491; *Allen* v. *Hanks*, 136 U. S. 300; *Hautgarn* v. *Mark*, *supra*, at 274 N. Y. 25.

The assertion (Petition, p. 15) that the final judgment of separation provided petitioner with an unchangeable contract property right subject to the impairment and due process clauses of the Federal Constitution likewise cannot be sustained.

A judgment, as such, unless founded upon an agreement, express or implied, is not subject to the constitutional prohibitions against impairment of a contract *Morley* v. *Lake Shore & Michigan Southern R. Co.*, 146 U. S. 162, 169; and a judgment of divorce or separation, lacking the necessary element of consent, is not within that category *Livingston* v. *Livingston*, 173 N. Y. 377, 382, although it may be subject to the due process clauses if it creates substantial property rights Idem, at p. 382.

Petitioner's judgment of final separation, however, granted her no property rights. *Simons* v. *Miami First Nat. Bank*, 381 U. S. 84, 84. The various so-called property rights described by petitioner did not flow to her from the separation decree, nor were they provided for therein. They were mere inchoate legislative grants which petitioner already possessed as an incident to her marital status, and were alterable by the Legislature at any time. The only right even remotely resembling a property right acquired by petitioner under her final decree of separation was the right to alimony, but even that was not an absolute or final right since under the law as it existed at that time (C.P.A. § 1170), as under existing New York law (Domestic Relations Law § 236), it was at all times, even after final judgment, subject to annulment or amendment.

As for equal protection, the Constitution requires only that statutory classifications or distinctions be reasonable and not arbitrary or capricious. *McGowan* v. *Maryland*, 366 U. S. 420, 425.

There is nothing arbitrary or unreasonable in a legislative enactment that treats spouses separated pursuant to a decree as in one class and spouses separated pursuant to an agreement in another. *Gleason* v. *Gleason*, *supra*, at 26 N. Y. 2d 41. In fact, it is common practice.

Our Federal income tax laws furnish a good example of this. Thus, in 1942 a provision was added to what is now Section 71 of the Internal Revenue Code taxing alimony paid pursuant to a separation decree to the wife, but in no way affecting alimony paid pursuant to a separation agreement. The purpose of the amendment was to relieve divorced and separated husbands of the tax burden on amounts paid as alimony and to shift that burden to the wife. *Russell* v. *Russell*, 142 F. 2d 753, 754, D. C. Cir. 1944. The statute in its original form, taxing only wives separated by decree and not those separated by agreement, was held to be constitutional, applicable to divorce and separation decrees in existence at the time of the amendment and prior thereto and not violative of due process and other constitutional guarantees as so applied. *Mahand* v. *U. S.*, 88 Fed. Supp. 285 (Ct. Cl. 1950) cert. den. 339 U. S. 978, rehearing den. 340 U. S. 847; *Fairbanks* v. *Commissioner*, 191 F. 2d 680 (9th Cir. 1951), cert. den. 343 U. S. 915; *Neeman* v. *Commissioner of Internal Revenue*, 255 F. 2d 841 (2d Cir.), cert. den. 338 U. S. 841. It was not until twelve years later, in 1954, that a provision was added to the statute taxing wives with alimony received pursuant to separation agreements.

In addition to our Federal laws, the laws of other States, which may be looked to in determining whether a classification is reasonable *Bain Peanut Co.* v. *Pinson*, 282 U. S. 499,

502, contain identical or similar classifications. Cf. Ala. Stat. § 22(1); Minn. Stat. Ann. § 518.06.

Finally, as Judge Fuld pointed out in the *Gleason* case, *supra*, at page 42, "we note that, when confronted with constitutional challenges such as those now urged upon us, the high courts of a number of jurisdictions have upheld the retroactive application of similarly constructed legislation permitting divorce either where the parties had been living apart pursuant to an 'old' separation decree (see, e.g., *Stallings* v. *Stallings*, 177 La. 488; *Hagen* v. *Hagen*, 205 Va. 791) or where they had simply been living apart for a specified period. (See, e.g., *Tipping* v. *Tipping*, 82 F. 2d 828; *Fuqua* v. *Fuqua*, 268 Ala. 127; *Hurry* v. *Hurry*, 144 La. 877; *Campbell* v. *Campbell*, 174 Md. 229; *McGinley* v. *McGinley*, 295 S. W. 2d 913 [Tex.]. See, also, Ann., Divorce Statute—Retrospective Effect, 23 ALR 3d 626, 633-636.)"

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

JOHN E. HIGGISTON, JR.,
Attorney for Respondent,
29 Broadway,
New York, N. Y. 10006.

New York, N. Y., August 25, 1970.

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IN THE

Supreme Court of the United States

October Term, 1970

No. 514

MARIE F. WINKLER,

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against

FREDERICK E. WINKLER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

PETITIONER'S REPLY MEMORANDUM

ZENAIDA DRABKIN,
Attorney for Petitioner,
84 William Street,
New York, N. Y. 10038.

MORTIMER H. KOENIG,
GRACE H. CONNELL,
JESSE SISKIND,
On the Brief.

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PETITIONER'S REPLY MEMORANDUM

Respondent at page 3 of his brief states that in order for this Court to consider a review of the order of the New York Court of Appeals, it must fall within "that small class which finally determines claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated". *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541, 546; *Local No. 438* v. *Curry*, 371 U. S. 542, 549.

It is first to be noted that in the very next sentence following the foregoing quotation, the Court added this significant comment: "The Court has long given this provision of the statute this practical rather than a technical construction." Petitioner urges that since there is here a fundamental clear cut issue of constitutional law basic

to any further consideration of this case and that since there is nothing more of substance to be decided, the rights asserted herein are too important, not only to petitioner, but to countless others similarly situated, to be denied review now or to permit them to remain undetermined until the whole case is adjudicated. The decision in *Gleason*, 26 N. Y. 2d 28, 308 N. Y. S. 2d 347, has imposed divorce upon countless spouses separated under decrees entered prior to the effective date of the statute. If petitioner were required to wait to request a review until this whole litigation were adjudicated, including a further appeal to the Court of Appeals, another year and a half or two might elapse. In the interim many divorces will have been granted involving the precise constitutional questions presented herein. A reversal by this Court at that time will be of but academic value to those who had been subjected, over their objections, to decrees of divorce based on the decision in *Gleason*. The result of any such reversal would be irreparably lost to them.

The wife's denial in her answer of the formal allegation made in the plaintiff husband's complaint that he has substantially performed all of the terms and conditions of the decree in that he has "made the payments and maintained the insurance as ordered therein" was made for the reason that it is a jurisdiction requirement as respondent states at page 4 of his brief. The denial was made for the purpose of putting plaintiff to his proof without any reasonable expectation that he would be unable to prove substantial performance of the financial obligations provided for in the separation decree, particularly since performance of some of these financial obligations is peculiarly within his knowledge. This denial does not constitute an affirmative defense. It is to be noted that the statute (Domestic Relations Law §170 Sub. 5, Chapter 700 of the Laws of 1968. Appendix D1) requires proof by

the plaintiff that he has only "substantially performed," having been liberalized from the original requirement of proof that plaintiff has "duly performed" as provided in the original divorce reform law. (Chapter 254 of the Laws of 1966). It is thus all the more patent that petitioner herein has been denied any "defense" of substance other than her constitutional defenses. In *Local No. 438* v. *Curry*, 371 U. S. 542, 551, Mr. Justice White in delivering the opinion of the Court stated "Since there was nothing more of substance to be decided in the trial court, the judgment below was final within the meaning of 28 USC §1257 and within the scope of the Pope and Richfield cases."

Petitioner has since served an amended answer which is the same as the original answer, but which also includes the only affirmative defense which she has, namely, the constitutional defenses which this Court is being asked to pass upon.

Respondent asserts, at page 4 of his brief, that since the trial court has power to provide financially for a wife, and it has not as yet done so, the order is not final. We point out that the subsisting separation decree has already made such financial provisions, (all of which terminate on the death of the husband) and that when the separation decree is superseded by the divorce decree, the financial provisions will be carried over into the divorce decree. The broad and continuing power of the Court under §236 of the Domestic Relations Law to provide support for a wife in any matrimonial action, referred to by respondent at page 4 of his brief, is completely separable from the issues presented in this litigation and continues no matter what the status of the case or the time of entry of the decree. This would in no way affect the finality of the judgment for the purposes of giving this Court jurisdiction to review.

CONCLUSION

There is nothing more of substance to be decided below in this case and this Court has jurisdiction to entertain the petition and should grant the writ.

Respectfully submitted,

ZENAIDA DRABKIN,
Attorney for Petitioner.

MORTIMER H. KOENIG,
GRACE H. CONNELL,
JESSE SISKIND,
On the Brief.